Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM,

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel

J. Peter Coll, Jr.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York
10103
(212) 506-5000

Jonathan William Rauchway
Counsel of Record

William A. Bianco
Gale T. Miller
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, Colorado 80202
(303) 892-9400

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a racially discriminatory state law that bars felons from voting is immune from challenge under Section 2 of the Voting Rights Act of 1965.

2. Whether the "plain statement rule" of statutory construction may be applied to an unambiguous statute such as Section 2 of the Voting Rights Act of 1965.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-49a) is reported at 366 F.3d 102. The opinion of the district court (App., *infra*, 50a-72a), which incorporated the order dismissing Petitioner's case, is unreported.

JURISDICTION

The court of appeals' judgment was entered on April 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act of 1965 (the "VRA") prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a), App., *infra*, 73a.

New York's felon-disenfranchisement statute, New York State Election Law § 5-106(2)-(5), is reproduced at App., *infra*, 75a-76a.

The Fourteenth and Fifteenth Amendments to the United States Constitution, U.S. Const. amends. XIV, XV, are reproduced at App., *infra*, 77a-79a.

STATEMENT

This case raises important and recurring issues concerning the scope of Section 2 of the Voting Rights Act and Congress's power to enforce the Fourteenth and Fifteenth Amendments to prohibit racial discrimination in voting, which can only be resolved by this Court. The court of appeals' holding that Section 2 of the VRA "does not apply" to state felon-disenfranchisement statutes, App., *infra*, at 22a, 48a, directly conflicts with recent decisions of the Ninth and Eleventh Circuits, and implicitly conflicts with decisions of the Fourth and Sixth Circuits. Moreover, the court of appeals' method of statutory interpretation – specifically, its use of the "clear statement" or "plain statement" rule – directly conflicts with numerous decisions of this Court holding that this rule cannot be applied to unambiguous statutes.

Because the court below held that New York's felon-disenfranchisement law is immune from challenge under the VRA as a matter of law, Petitioner's claims were dismissed on a totally undeveloped factual record. As such, Petitioner – who was *pro se* in the district court – was denied the right to present any evidence to support his claim that New York's felon-disenfranchisement law interacts with discrimination in the criminal justice system in a manner that results in the denial of his right to vote on account of race. Such evidence, however, can be found even in the State's own publicly available reports, which acknowledge that "rampant racism

still infects" its criminal justice system and show that minorities are disenfranchised at ten times the rate of non-minorities in New York. *See infra* pp. 5-6 and notes 2, 3.[1]

The court below recognized the conflict created by its decision and expressly invited review by this Court. *See* App., *infra*, at 1a-2a ("[W]e recognize that this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court . . . .") & 49a ("[A]ll three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court.").

I. Voting Discrimination In New York State And The Voting Rights Act.

The Voting Rights Act was enacted in 1965 to rid the country of racial discrimination in voting. Some provisions of the Act apply only to specified "covered jurisdictions." Pursuant to Section 5 of the Act, a "covered jurisdiction" cannot enact new voting qualifications, prerequisites to voting, or standards, practices, or procedures without first obtaining pre-clearance from either the Attorney General of the United States or the United States District Court for the District of Columbia. Section 2, by contrast, applies nationwide and was amended in 1982 to prohibit any voting qualification that results in vote denial or vote dilution, eliminating the requirement that a plaintiff prove discriminatory intent. Neither New York State nor any of its subdivisions were designated as "covered jurisdictions" under the original Act.

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[1] The publicly available statistics cited herein were compiled by appointed counsel in the appellate stages of this case.

Black and Hispanic New Yorkers do, however, contend with racial discrimination in voting, and the VRA was amended to recognize that fact. Shortly after the VRA was enacted, this Court held that New York's voter literacy test violated the Act. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Nonetheless, New York maintained an English literacy requirement for voters until 1977, over ten years after that decision. *See* 49 N.Y. Jur. 2d Elections § 126.

New York's racially discriminatory voting practices were a specific target of the 1970 amendments to the Act, which designated New York, Bronx, and Kings Counties as "covered jurisdictions." *See NAACP v. New York,* 413 U.S. 345, 352-53, 357 (1973) ("Indeed, it is clear that the three counties were a definite target of the 1970 amendments."). When Congress amended the Act again in 1982, it cited a redistricting plan for New York, Kings, and Bronx counties, which "discriminated against black and Hispanic voters," as evidence of the continuing need for the pre-clearance requirement. *See* S. Rep. No. 97-417, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 188. New York is the only major Northeastern state in which pre-clearance under the VRA is required.

II. Racial Discrimination In New York's Criminal Justice System And Felon Disenfranchisement In New York.

Although African Americans and Hispanics make up less than 30 percent of New York's voting-age population, they comprise 80 percent of the inmates in New York's state

prison population.[2] The incarceration rate for voting-age African Americans and Hispanics in New York is more than 10 times that of the rest of the voting-age population; because New York disenfranchises only felons whose sentences include incarceration, African Americans and Hispanics in New York lose their right to vote at a rate more than ten times the rate for non-minorities.[3]

Numerous public reports, issued by Respondents' own criminal justice agencies, uniformly show that the gross racial disparity in New York's prison population is caused by race-based disparities in sentencing.[4] For example, New York State's Judicial Commission on Minorities, which was convened in 1988 in response to the widespread belief that race plays a significant role in the outcome of court cases, has consistently concluded that minority defendants are

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[2] *See* U.S. Census Bureau, Census 2000 Redistricting Data Summary File, New York State data available in table format at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_PL_U_QTPL&ds_name=DEC_2000_PL_U&geo_id=04000US36; State of New York Department of Correctional Services, *HUB System: Profile of Inmate Population Under Custody on January 1, 2004*, at 7 (2004).

[3] According to New York State Department of Corrections statistics and the 2000 Census, 51,826 out of New York's 3,953,198 voting-age African Americans and Hispanics were incarcerated as of January 1, 2004, for an incarceration rate of .01311. By contrast, 13,371 out of New York's approximately 10.3 million voting age non-blacks and Hispanics were incarcerated for an incarceration rate of .00130. (.01311 ÷ .00131 = 10.08.) *See* U.S. Census Bureau, *supra* n.2; State of New York Department of Correctional Service, *supra* n.2, at 7.

[4] *See, e.g.*, Report of the New York State Judicial Commission on Minorities (Apr. 1991) ("*1991 Report*"); The Franklin H. Williams Judicial Commission on Minorities, *Equal Justice: A Work In Progress, Five Year Report* (1991-1996) ("*Five Year Report*"); James F. Nelson, New York State Division of Criminal Justice Services, *Disparities in Processing Felony Arrests in New York State, 1990-1992* (1995) ("*DCJS Study*").

given harsher sentences than white defendants. *See 1991 Report, supra* n.4, at 40; *Five Year Report, supra* n.4, at 34. In its Five Year Report, the Commission, citing a two-year study by the Division of Criminal Justice Services ("DCJS"), *see DCJS Study, supra* n.4, reported that minorities are sentenced to incarceration more often than comparably situated whites. *See Five Year Report, supra* n.4, at 34. Commenting on the magnitude of the disparity, the Commission noted that "one in three minorities sentenced to jail would have received a different sentence if they were processed as comparably situated whites." *Id.* Based on disparity in sentencing and other evidence of discrimination, the Commission concluded that "rampant racism still infects our criminal justice system, disproportionately impacting the lives of minority male defendants and their families." *Id.*

New York disenfranchises only felons who are currently incarcerated or on parole. Felons who receive probation retain their right to vote. Unfortunately, the above studies establish that whether a convicted felon receives probation or a prison sentence depends, at least in part, on race. *See DCJS Study, supra* n.4, at viii. Persons convicted of a felony in New York may receive a prison sentence, probation, a fine, conditional or unconditional discharge, or some combination of these sanctions. *Id.* The DCJS Study, after controlling for differences in prior criminal histories, seriousness of charges, and several other variables, found that minorities were sentenced to incarceration more often than comparably situated whites. *Id.* Further, the study found that whites were sentenced to probation more often than comparably situated minorities. *Id.* As a result, it appears that in New York, African-American and Hispanic felons are disenfranchised more often than similarly situated non-minority felons for no reason other than their race.

III. The Proceedings Below.

A. The District Court's Decision.

Petitioner, a black man serving a life sentence in a New York State prison, filed a *pro se* complaint alleging that New York State Election Law § 5-106, New York's felon-disenfranchisement statute, denies him the right to vote in violation of Section 2 of the VRA. Petitioner further alleged that the law violates the VRA because it results in the unlawful dilution of the African-American and Hispanic vote in New York State.[5] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and Section 2 of the VRA, 42 U.S.C. § 1973. Petitioner represented himself throughout the proceedings in the district court, and his original *pro se* complaint has never been amended.

No significant discovery took place, and the case languished for five years until Respondents moved for summary judgment based on the pleadings and one affidavit, not relevant to the VRA claims. The district court granted Respondents' motion in its entirety in a Memorandum-Decision and Order dated January 24, 2001. App., *infra*, 50a-72a. In its decision, the district court framed "[t]he initial question" as whether "the Voting Rights Act is even an appropriate limitation on New York State's felon disenfranchisement power." *Id.* at 55a. The court then noted that the issue of whether a plaintiff can state a claim challenging New York's felon-disenfranchisement statute had previously been reached by the Second Circuit, sitting *en banc* in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). *Id.* at 58a-61a. In that case, ten judges of the court split evenly on the issue, resulting in three non-precedential opinions and an

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[5] Petitioner asserted other claims, none of which were appealed to the Second Circuit. Petitioner seeks a grant of certiorari to review only the dismissal of his vote denial claim.

affirmance of the district court, which had dismissed the plaintiffs' claims. *See Baker*, 85 F.3d at 921 & n.2.

Noting the "general disagreement existing among other Circuit Courts," and relying exclusively on Judge Mahoney's non-binding opinion in *Baker* and the Fourth Circuit's decision in *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (unpublished table decision), the district court found "the VRA inapplicable to Section 5-106." App., *infra*, 61a-63a. The district court's rationale for its holding was that because "application of the VRA to Section 5-106 seemingly works to undermine the constitutional balance that exists between federal and state governments" therefore "an 'unmistakably clear' statement by Congress stating their intention to alter this balance must be provided." *Id.* at 63a. Because it so held, the district court found a "discussion of the merits" of Petitioner's claim "unnecessary." *Id.*

B. The Court Of Appeals' Decision.

A panel of the court of appeals affirmed the district court's dismissal of Petitioner's claims. The Second Circuit began its analysis by reviewing the three prior opinions of that court in the *Baker* case and the decision of the district court below. *See* App., *infra*, 8a-16a. The court then turned to two recent decisions of the Ninth and Eleventh Circuits, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *petition for cert. filed*, -- U.S. -- (May 24, 2004), and *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), both of which had held that Section 2 of the VRA does apply to felon-disenfranchisement statutes. *See* App., *infra*, 16a-22a.

The Second Circuit, however, concluded that Section 2 of the VRA "does not apply" to New York's felon-

disenfranchisement law. *See id.* at 22a. The court of appeals reached this conclusion by applying the "plain statement" or "clear statement" rule of statutory construction to interpret the VRA. *See id.* at 22a, 46a-47a. According to the court of appeals, the application of the VRA to a state felon-disenfranchisement statute "would alter the traditional balance of power between the States and the Federal Government" and therefore, the court required "a clear statement from Congress indicating Congress's intent to infringe upon the states' authority to prohibit felons from voting" in the VRA before it would allow such a claim to proceed. *Id.* Finding "no such clear statement" in the text or legislative history of Section 2, the Second Circuit held that Petitioner's claim "fails as a matter of law." *Id.*

The Second Circuit understood that its holding was in direct conflict with the Ninth Circuit's decision in *Farrakhan* and the Eleventh Circuit's decision in *Johnson*. *Id.* at 16a-17a. The Second Circuit also was aware of the implicit conflict between its holding and decisions of the Fourth and Sixth Circuits. *See id.* at 17a n.12 (citing *Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984 (4th Cir. Feb. 23, 2000) and *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986)).

Although the Second Circuit recognized that Section 2 of the VRA "while vague, does not seem ambiguous," App., *infra*, 45a-46a n.22, it rejected Petitioner's argument – which cited to numerous decisions of this Court – that the plain statement rule could not be applied to the VRA because the VRA is not ambiguous.

The Second Circuit also rejected Petitioner's argument that the ordinary meaning of the language of Section 2 should govern its analysis. Rather, it engaged in an examination of the legislative history of the VRA, and concluded that "there is ample evidence that Congress did

not intend to prohibit felon disenfranchisement statutes when it enacted and amended the VRA." *Id.* at 44a.

Finally, the Second Circuit expressed its "doubt[]" that, as Petitioner asserted, Section 2 of the VRA is a constitutionally congruent and proportional remedy as applied to felon-disenfranchisement laws with racially discriminatory results. *Id.* at 40a. Because the Second Circuit believed such an effectuation of the VRA "would disturb the balance of power between the States and the Federal Government, as conceived by the Supreme Court," it avoided the issue, relying instead on the plain statement rule for its holding that Petitioner could not state such a claim under the VRA. *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

I. There Is Conflict Among And Within The Circuits Over Whether Felon-Disenfranchisement Laws Can Be Challenged Under Section 2 Of The Voting Rights Act.

The court of appeals acknowledged that its holding created a direct conflict with the decisions of the Ninth and Eleventh Circuits, *see* App., *infra*, at 16a-17a, and an implicit conflict with the Fourth and Sixth Circuits. *See id.* at 17a n.12. Moreover, the Circuits are internally divided on this issue. The first time this issue was reached by the Second Circuit, it resulted in an even split of the ten judges eligible to sit *en banc* on that case. *See Baker*, 85 F.3d at 921 & n.2. Although the decision below was unanimous, the Eleventh Circuit's decision in *Johnson* was not, with the dissent presenting many of the same arguments relied upon by the Second Circuit in this case. *See Johnson*, 353 F.3d at 1314-1318 (Kravitch, J., dissenting). Additionally, while the Ninth Circuit's panel decision in *Farrakhan* was unanimous, the denial of the petition for rehearing *en banc* was

accompanied by the vigorous dissent of seven judges of that court. *Farrakhan v. Washington*, 359 F.3d 1116, 1117-27 (9th Cir. 2004) (Kozinski, J., dissenting, joined by O'Scannlain, Kleinfeld, Tallman, Bybee, Callahan, and Bea, JJ.) Like Judge Kravitch, Judge Kozinski expressed misgivings about the application of Section 2 of the VRA to state felon-disenfranchisement laws similar to those expressed by the Second Circuit in this case.

A. This Case Squarely Presents The Conflict.

The court of appeals' affirmance of the district court's dismissal of Petitioner's claims was based solely on its conclusion that a claim challenging a state felon-disenfranchisement statute under Section 2 of the VRA "fails as a matter of law" because the VRA "does not apply" to such statutes. App., *infra*, at 22a, 48a; *see also id.* at 28a (noting that if the court had held otherwise, "it would appear that Muntaqim has stated a valid § 1973 claim").

The court of appeals was able to arrive at this conclusion only through its application of the plain or clear statement rule of statutory construction, which the court believed allowed it to override the unambiguous language of Section 2 of the VRA.

In contrast to the Fourth, Sixth, Ninth, and Eleventh Circuits, felon-disenfranchisement statutes in the Second Circuit are absolutely immune to challenge under the VRA, regardless of the facts. Without resolution of the conflict by this Court, lower courts will continue to disagree on this issue and the proper method of its analysis, including the scope of the plain statement rule. Moreover, if allowed to stand, the precedent established by the court of appeals with respect to the plain statement rule would permit lower courts to ignore the plain language of any statute, depending on

their individual views as to what might "alter the federal balance." *See* App., *infra*, 42a.

B. This Recurring Issue Is Of Great National Importance And Can Be Resolved Only By This Court.

The impact of felon-disenfranchisement laws on racial minorities is a well-documented, nationwide problem. Forty-eight of the fifty states provide for some type of felon disenfranchisement. *See* The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, *available at* http://www.sentencingproject.org/pdfs/1046.pdf. In every one of these states, felon disenfranchisement has a greater effect on racial minorities than on the general population. *See* Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, at 13 (Apr. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim01.pdf. Of the estimated 3.9 million disenfranchised felons nationwide, over one third are African-American men. Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, at 1 (Oct. 1998), *available at* http://www.sentencingproject.org/pdfs/9080.pdf. The impact of felon disenfranchisement on Hispanics is also significant. One study of ten representative states found that, in more than half of the states, Hispanics were disenfranchised at disproportionately higher rates compared to their presence in the voting-age population. Marisa J. Demeo & Steven A. Ochoa, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, at 15 (MALDEF 2003), *available at* http://www.sentencingproject.org/pdfs/maldef-rpt.pdf. The disparate impact of felon-disenfranchisement laws is felt nationwide, and the application of the VRA to this problem is an issue of manifest public importance that only this Court can resolve.

The court below agreed. In both the first and last paragraphs of its decision, the court of appeals expressed its belief that the issues presented in this Petition can only be definitively decided by this Court. App., *infra*, at 1a-2a & 49a.

Additionally, the issues presented in this Petition are ripe for consideration by this Court. The first decision of a court of appeals on the applicability of Section 2 of the VRA to a state's felon-disenfranchisement law was over eighteen years ago, and there has been no clarity in the law since. In addition to the *Farrakhan* and *Johnson* cases, there are at least three other VRA challenges to state felon-disenfranchisement laws pending in lower courts around the country. *See, e.g.*, *Simmons v. Galvin*, No. 01-cv-11040-MLW (D. Mass.); *Hayden v. Pataki*, No. 00-cv-08586-LMM-HBP (S.D.N.Y.); *NAACP v. Harvey*, No. UNN-C-4-04 (N.J. Super. Ct. Ch. Div.). Applicability of Section 2 of the VRA to state felon-disenfranchisement laws is a threshold issue in all of these cases, and should be decided by this Court.

II. The Decision Below Is Incorrect.

First, the methodology employed by the Second Circuit is incorrect and cannot stand because the court of appeals' use of the plain statement rule flies in the face of the established precedent of this Court. There can be no dispute that: (1) Petitioner is a citizen of the United States; (2) the challenged felon-disenfranchisement law is a "voting qualification or prerequisite to voting"; or (3) Petitioner has adequately alleged that the disenfranchisement law is applied by New York State in a manner that results in racial discrimination. The Second Circuit did not reject any of Petitioner's assertions on these points and recognized that Section 2 of the VRA is unambiguous. Nonetheless, in contravention of this Court's explicit holdings to the

contrary, it applied a limited rule of statutory construction to an unambiguous statute to void the plain and ordinary meaning of that statute's language.

Second, and more importantly, the Second Circuit's flawed methodology resulted in an erroneous conclusion: a conclusion that conflicts with that of every other court of appeals to have reached this issue. *See Johnson*, 353 F.3d at 1306 & n.27; *Farrakhan*, 338 F.3d at 1016; *see Howard*, 2000 WL 203984, at * 1; *Wesley*, 791 F.2d at 1259-61. The court of appeals' decision was driven by its belief that Section 2 of the VRA might be unconstitutional if applied to New York's felon-disenfranchisement law. Because it used the plain statement rule to exempt New York's felon-disenfranchisement law from scrutiny under the VRA, however, the court of appeals avoided this issue. Ultimately, the constitutional issue raised – but not decided – by the court of appeals should be resolved under the framework and precedents established by this Court in favor of this exercise of Congressional authority.

A. The Court Of Appeals' Application Of The Plain Statement Rule To The Voting Rights Act Directly Conflicts With Multiple Decisions Of This Court.

Section 2 of the VRA is not ambiguous and the court of appeals acknowledged this fact:

> Section 1973, while vague, does not seem ambiguous. It states that "*[n]o* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of *any*

> *citizen* of the United States to vote on account of race or color."

App., *infra*, 45a-46a n.22 (emphasis in original); *see also id.* at 47a ("[W]e conclude that the clear statement rule is applicable, despite the fact that, on its face, § 1973 extends to all voting qualifications.").

In recent years, this Court has repeatedly held that lower courts may employ the plain or clear statement rule of statutory construction only when the statute in question is ambiguous. *Penn. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 208-11 (1998); *Salinas v. United States*, 522 U.S. 52, 60 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 57 n.9 (1996); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Most recently, this Court held that "in the context of an unambiguous statutory text," the plain statement rule of *Gregory v. Ashcroft* "is irrelevant." *Yeskey*, 524 U.S. at 212. A year earlier, the Court elaborated in *Salinas v. United States*: "The plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." 522 U.S. at 60. Therefore, a court "'cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.' *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous." *Id.* (quoting *Seminole Tribe*, 517 U.S. at 57 n.9).

Moreover, at least one member of this Court has explicitly recognized that the plain statement rule should not be applied to Section 2 of the VRA. *See Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) ("[W]e tacitly rejected a 'plain statement' rule as applied to the unamended § 2 in *City of Rome v. United States* . . . . I am content to dispense [, as did the majority,] with the 'plain

statement' rule in the present cases . . . ."); *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419, 428 (1991) (Scalia, J., dissenting) (adopting dissent from *Chisom*).

Despite these precedents, the Second Circuit used the plain statement rule to carve out an exception for felon-disenfranchisement laws from the unambiguous coverage of Section 2 of the VRA.

B. The Court Of Appeals Erred By Exempting Felon-Disenfranchisement Laws That Result In Denial Of The Right To Vote On Account Of Race From The Coverage Of The Voting Rights Act.

The court of appeals agreed with Petitioner's assertion that Congress had the power to enact the "results test" of Section 2 of the VRA even though the law prohibits conduct that does not violate the Fourteenth and Fifteenth Amendments. Nonetheless, the court of appeals suggested that application of Section 2's results test to the New York felon-disenfranchisement law – unlike other facially neutral voting practices – would exceed Congress's constitutional authority under the "congruence and proportionality" test set forth by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997), and subsequent cases.

The court of appeals perceived a constitutional problem that "would disturb the balance of power between the States and the Federal Government," App., *infra*, at 42a, for two principal reasons: (1) the absence of Congressional findings that felon-disenfranchisement statutes have been used by the states, particularly New York, as tools of discrimination; and (2) the "other crime" provision of Fourteenth Amendment. Upon closer examination, however,

neither of these grounds provides a basis to exclude felon-disenfranchisement laws from the broad scope of Section 2 of the VRA.

1. *A Record Of Constitutional Violations.*

To comply with the congruence and proportionality test, remedial legislation must be responsive to, or designed to prevent, unconstitutional behavior. This test does not, however, require that every conceivable implementation of a statute of general applicability be supported by specific Congressional findings. There is a substantial historical record, acknowledged by this Court, that felon-disenfranchisement laws have been enacted and enforced for racially discriminatory purposes and with racially discriminatory results. In *Hunter v. Underwood*, this Court unanimously found that a criminal-disenfranchisement statute "was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." 471 U.S. 222, 233 (1985); *see also Williams v. Mississippi*, 170 U.S. 213, 222 (1898) (acknowledging racist intent of criminal-disenfranchisement act). And this Court has repeatedly pointed to the VRA as a congruent and proportional response to unlawful discrimination in voting. *See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (distinguishing Americans with Disabilities Act from VRA); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing Patent Remedy Act from VRA); *City of Boerne*, 521 U.S. at 526 (distinguishing Religious Freedom Restoration Act from VRA). That the legislative history of Section 2 of the VRA contains no specific discussion of discriminatory felon-disenfranchisement laws does not mean that there is no record of such discrimination or that application of the VRA to such laws would be unconstitutional.

Likewise, the congruence and proportionality test does not require a record that New York has historically used felon-disenfranchisement laws in a discriminatory fashion. In *Oregon v. Mitchell*, four states challenged the 1970 Amendments to the VRA, one of which extended the ban on literacy tests and similar devices, which had been restricted to specified jurisdictions under the original Act, to the entire nation. 400 U.S. 112, 118 (1970) (per Black, J.). Although the Court was sharply divided on other issues, all nine Justices concluded that this was a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments, even though the literacy tests were facially constitutional, *see id.* at 232, and there were no specific Congressional findings that the tests were used to perpetuate historical discrimination in states not covered by the original Act. *See id.* at 284 (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box."). The reach of the VRA is therefore not constitutionally limited to instances where a plaintiff can show that the specific challenged practice was enacted with a racially discriminatory motivation or perpetuates historical racial discrimination in a particular jurisdiction. *Id.*; *see also Katzenbach v. Morgan*, 384 U.S. at 646 n.3, 650-52 (upholding VRA Section 4(e)'s nationwide ban despite the absence of findings of discrimination outside New York State). Like the ban on literacy tests, Congress can permissibly legislate to counter racial discrimination in the operation and effect of felon-disenfranchisement laws

without specific findings that such statutes unfairly discriminate in every state in the union.

2. *The "Other Crime" Provision Of The Fourteenth Amendment.*

The court of appeals also relied on Section 2, or the "other crime" provision, of the Fourteenth Amendment to support its decision. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), which involved neither claims of racial discrimination nor the VRA, the Court held that because of Section 2 of the Fourteenth Amendment, state felon-disenfranchisement laws could not be held *per se* unconstitutional under the Equal Protection Clause of the same Amendment. *See id.* at 43. *Richardson*, however, did not address the question of whether Section 2 of the Fourteenth Amendment proscribes Congress from using its enforcement powers under the Fourteenth and Fifteenth Amendments to prohibit racially discriminatory felon disenfranchisement.

That question was answered by *Hunter*, in which the Court held that Alabama's criminal-disenfranchisement statute, that was "on its face . . . racially neutral, applying equally to anyone convicted of one of the enumerated crimes" violated the Equal Protection Clause of the Fourteenth Amendment because it disproportionately disenfranchised blacks and had been enacted with racially discriminatory intent. 471 U.S. at 227, 228-33. The *Hunter* court rejected the State's argument that *Richardson* and Section 2 of the Fourteenth Amendment exempted the disenfranchisement law from the proscriptions of the Equal Protection Clause. *Hunter*, 471 U.S. at 233 ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation

of [a state criminal-disenfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment.").

Hunter makes clear that Congress's power to apply the Equal Protection Clause to state felon-disenfranchisement laws is not limited by the "other crime" provision of the Fourteenth Amendment. Since that provision did not limit the application of the Equal Protection Clause to a state criminal-disenfranchisement law in *Hunter*, it cannot now be a barrier to Petitioner's challenge to such a disenfranchisement law under the VRA, which provides plaintiffs with a broader remedy than they have under direct Constitutional claims. Furthermore, the court below acknowledged that Section 2 of the VRA was enacted to enforce both the Fourteenth and the Fifteenth Amendments. *See* App., *infra*, 33a; *see also Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring). The court of appeals, however, offered no justification why the "other crime" provision of the Fourteenth Amendment should constrain Congress's authority to enforce the Fifteenth Amendment, which contains no such provision.

Prior to its amendment, Section 2 of the VRA was coextensive with the coverage provided by the Fourteenth and Fifteenth Amendments. This Court has recognized that the purpose of amending the Act in 1982 was to broaden the causes of action available to plaintiffs by providing them with a lower burden of proof for Section 2 claims than is required for Constitutional claims. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) ("When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component."); *Chisom*, 501 U.S. at 394 n.21 ("'The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose . . . . Plaintiffs must either prove such intent, or, alternatively, must show that the challenged

system or practice . . . results in minorities being denied equal access to the political process.'") (citation omitted).

The Second Circuit's holding affords plaintiffs who challenge felon-disenfranchisement statutes less protection under the Voting Rights Act than they have under the Constitution, and effectively abrogates the 1982 amendment to the VRA. And if allowed to stand, the consequence would be that plaintiffs, such as those in *Hunter*, who challenge a state felon-disenfranchisement law will be without a remedy if they cannot make the difficult, sometimes impossible, showing of discriminatory intent. *See Hunter*, 471 U.S. at 228 ("Proving the motivation behind official action is often a problematic undertaking."); *see also Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) ("The intent test was repudiated [because] it places an 'inordinately difficult' burden of proof on plaintiffs . . . .") (quoting S. Rep. No. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214). By contrast, application of Section 2 of the VRA to state felon-disenfranchisement statutes is consistent with the entirety of the Fourteenth and Fifteenth Amendments, the purpose of the 1982 Amendment to the Act, and this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan William Rauchway
Counsel of Record

William A. Bianco
Gale T. Miller
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, Colorado 80202
(303) 892-9400

Of Counsel

J. Peter Coll, Jr.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York
10103
(212) 506-5000

July 21, 2004.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: March 10, 2003 Decided: April 23, 2004)

Docket No. 01-7260

JALIL ABDUL MUNTAQIM,
also known as Anthony Bottom,

Plaintiff-Appellant,

—v.—

PHILLIP COOMBE, ANTHONY ANNUCCI, AND LOUIS F. MANN,

Defendants-Appellees.

Before:

MESKILL, CARDAMONE AND CABRANES,

Circuit Judges.

JOSÉ A. CABRANES, *Circuit Judge*:

We are asked in this case to decide whether the Voting Rights Act ("VRA"), which prohibits voting qualifications that result in the abridgment of the right to vote on account of race, can be applied to a New York State statute that disenfranchises currently incarcerated felons and parolees. Although we recognize that this is a difficult question that can ultimately be resolved only by a determination of the

United States Supreme Court, we conclude that the Voting Rights Act, which is silent on the topic of state felon disenfranchisement statutes, cannot be applied to draw into question the validity of New York's disenfranchisement statute. We believe that, in light of recent Supreme Court decisions that have clarified the scope of Congress's enforcement power under the Reconstruction Amendments,[1] the application of the Voting Rights Act to felon disenfranchisement statutes such as that of New York would infringe upon the states' well-established discretion to deprive felons of the right to vote. Because the Supreme Court has instructed us that statutes should not be construed to alter the constitutional balance between the states and the federal government unless Congress makes its intent to do so unmistakably clear, we will not construe the Voting Rights Act to extend to New York's felon disenfranchisement statute.

Plaintiff-Appellant Jalil Abdul Muntaqim, a convicted felon imprisoned in New York, appeals from a judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, *Judge*), granting defendants' motion for summary judgment and dismissing the complaint in its entirety. In the complaint, Muntaqim alleged, *inter alia,* that New York State's felon disenfranchisement statute, N.Y. Elec. Law § 5-106 ("§ 5-106"), violates section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (*codified as amended at* 42 U.S.C. § 1973) ("§ 1973"). Section 5-106 disenfranchises all felons in the State of New York who are incarcerated or on parole. Muntaqim asserts that this statute violates § 1973 because it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

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[1] For ease of reference, we refer to the Fourteenth and Fifteenth Amendments of the Constitution as the Reconstruction Amendments.

The District Court concluded that Muntaqim had failed to state a § 1973 claim because that provision of the Voting Rights Act is not applicable to New York's felon disenfranchisement statute. We agree. Under Supreme Court precedent, because § 1973 would alter the constitutional balance between the states and the federal government if it were construed to extend to state felon disenfranchisement statutes such as § 5-106, we look for a clear statement from Congress to support that construction of the statute. Having found no such statement, we hold that § 1973 cannot be used to challenge the legality of § 5-106. In so holding, we do not in any way cast doubt on Congress's authority to enact the Voting Rights Act, nor do we purport to decide whether, as a general rule, the "results" methodology of § 1973 is constitutionally valid. Instead, we hold only that, in the absence of a clear statement from Congress, § 1973 should not be applied to state felon disenfranchisement statutes, such as those of New York, which are expressly sanctioned in the text of the Constitution and have been widely used as a penological tool since before the Civil War.

BACKGROUND

Muntaqim is a black inmate at the Shawangunk Correctional Facility in Wallkill, New York who is currently serving a maximum sentence of life imprisonment. On September 26, 1994, he filed a *pro se* complaint against several officials of the New York State Department of Correctional Services (collectively, "defendants") alleging, *inter alia,* that § 5-106, New York State's felon disenfranchisement statute, violates § 1973 because it "results in a denial or abridgement of the right . . . to vote on account of race." 42 U.S.C. § 1973(a).[2]

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[2] The complaint also challenged the constitutionality of § 5-106, as well as § 79-a of the New York State Civil Rights Law, which deems persons sentenced to life imprisonment to be "civilly dead"; § 803 of the New York State Correction Law, which prohibits inmates serving life

In particular, the complaint asserts that, even if the New York State legislature did not intend to discriminate when it enacted § 5-106, that statute violates the Voting Rights Act because it has "'resulted' in unlawful dilution of voting rolls in the African-American and Hispanic communities of New York City" (Compl. ¶ 18), and because the racial disparity in New York's prison population is caused, at least in part, by racial discrimination in sentencing.[3] Muntaqim alleges that, although blacks and Hispanics constitute less than thirty percent of the voting-age population in New York State, they make up over eighty percent of the inmates in the state prison system. Moreover, according to the complaint, eighty percent of incarcerated Hispanics and blacks come from "New York City and it[ ]s environs."[4] (*Id.*) Based on these

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sentences from accumulating "good time credits"; and § 805 of the New York State Correction Law, which, at the time of this appeal, prevented inmates who are serving a minimum sentence of more than six years from participating in the "earned eligibility program." The District Court granted summary judgment to the defendants dismissing each of these claims, and Muntaqim does not challenge their dismissal on appeal.

[3] Although Muntaqim does not unambiguously allege racial discrimination in sentencing, we read his *pro se* pleadings "liberally and interpret them to raise the strongest arguments that they suggest." *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir. 1999). From that standpoint, we agree with Muntaqim's appellate counsel that Muntaqim's complaint, which states that "[t]he defendants are . . . engaging in conduct that discriminates and establishes a class system of disenfranchisement" (Compl. ¶ 8), and that African-Americans and Hispanics who have been sentenced in New York have been "irreperabl[y] harm[ed]" (Compl. ¶ 18), should be construed to mean that the "gross racial disparity in New York's prison population is caused, at least in part, by race-based disparities in sentencing," Pl.'s Br. at 5.

[4] The New York State Constitution provides that, "[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while confined in any public prison." N.Y. Const. art. II, § 4. Accordingly, enfranchised prisoners vote in the district where they resided prior to incarceration. For this reason, the greater the number of incarcerated felons who come from New York City, the greater the impact of § 5-106 on the vote in New York City.

figures, Muntaqim claims that § 5-106 violates § 1973 both by denying him the right to vote and by "diluting" the so-called black and Hispanic vote in New York City.[5]

On October 25, 1999, the defendants moved for summary judgment, and the motion was referred to Magistrate Judge Gustave J. DiBianco. The magistrate judge filed a Report and Recommendation on July 18, 2000, recommending that the defendants' motion be granted because § 1973 is not applicable to felon disenfranchisement statutes. After receipt of Muntaqim's timely objection, the District Court adopted in full the Report and Recommendation on January 24, 2001, and entered judgment in favor of the defendants. Muntaqim then filed a timely notice of appeal, and, on June 4, 2002, we appointed counsel for Muntaqim.

Because the District Court ruled that Muntaqim's complaint failed to state a cognizable claim under the Voting Rights Act, we will treat its decision as a ruling on a motion to dismiss rather than a ruling on a motion for summary judgment. *See Schwartz v. Compagnie General Trans-atlantique,* 405 F.2d 270, 273 (2d Cir. 1968) ("A motion for summary judgment may be made solely on the pleadings[;] when it is so made it is functionally the same as a motion to dismiss or a motion for judgment on the pleadings.").

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[5] A plaintiff may raise two separate types of § 1973 claims: "vote denial" and "vote dilution". Vote denial occurs, as the term denotes, when the ability to vote is denied on account of race, while vote dilution occurs when a voting practice diminishes "the force of minority votes that were duly cast and counted." *Holder v. Hall,* 512 U.S. 874, 896 (1994) (Scalia and Thomas, JJ., concurring in judgment). Muntaqim's vote denial claim is based on the fact that § 5-106 prohibits him from voting. (*See* Compl. ¶¶ 12-16) His vote dilution claim appears to be based on his claim that § 5-106 disproportionately diminishes the strength of votes cast by Hispanic and black voters who reside in and around New York City. (*See* Compl. ¶ 18).

DISCUSSION

I. *Standard of Review*

We review District Court determinations on motions to dismiss and motions for summary judgment *de novo*. *See, e.g., Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). In this case, "because the district court's disposition 'presents only a legal issue of statutory interpretation . . . . [w]e review *de novo* whether the district court correctly interpreted the statute.'" *Perry v. Dowling*, 95 F.3d 231, 235 (2d Cir. 1996) (quoting *White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993)).

II. *Relevant Statutory Provisions*

Section 5-106 of the New York Election Law provides that no person convicted of a felony "shall have the right to register for or vote at any election" unless he has been pardoned, his maximum sentence of imprisonment has expired, or he has been discharged from parole.[6]

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[6] New York Election Law § 5-106(2)-(5) states, in relevant part:

2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

3. No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the president of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

4. No person who has been convicted in another state for a crime or offense which would constitute a felony under the laws of this state shall have the right to register for or vote at any election in

Accordingly, no residents of New York State who are presently incarcerated for a felony or are on parole may vote in local, state, or federal elections.[7]

Section 2 of the Voting Rights Act, codified at 42 U.S.C. § 1973 and originally enacted in 1965, prohibits any state limitation on the right to vote that has a racially discriminatory result. In particular, the current version of § 1973(a) provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a).[8] Section 1973(b) states that "[a] violation of subsection (a) . . . is established if, based on the totality of the circumstances, it is shown that . . . members [of protected racial minorities] have less opportunity than

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this state unless he shall have been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or his maximum sentence has expired, or he has been discharged from parole.

5. The provisions of subdivisions two, three and four of this section shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.

[7] Although § 5-106 disenfranchises felons on parole as well as incarcerated felons, for ease of reference we refer to the class of felons disenfranchised by § 5-106 as "incarcerated felons." *Cf. Dixon v. Miller*, 293 F.3d 74, 78 (2d Cir. 2002) (noting that a convict released on parole is still treated for habeas purposes as if he were "in custody").

[8] Before its amendment in 1982, § 1973 provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980).

other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The current language of § 1973 was enacted by Congress as part of the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, largely in response to the Supreme Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55 (1980). *See Thornburg v. Gingles,* 478 U.S. 30, 35 (1986). In *Bolden,* a plurality of the Court held that racially neutral state action violates § 1973 only if it is motivated by a discriminatory purpose. 446 U.S. at 62. The amended version of § 1973 eliminates this "discriminatory purpose" requirement and, instead, prohibits any voting qualification or standard that "results" in the denial of the right to vote "on account of" race.

III. *Applicability of § 1973 to Felon Disenfranchisement Statutes*

A. *Baker v. Pataki*

In *Baker v. Pataki,* 85 F.3d 919 (2d Cir. 1996), our *in banc* Court addressed the exact legal question presented by this case—namely, whether § 1973 is applicable to felon disenfranchisement statutes generally and to § 5-106 in particular.[9] Because the ten members of the Court who decided

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[9] In *Baker,* a group of black and Hispanic disenfranchised felons brought claims pursuant to 42 U.S.C. § 1983, alleging that § 5-106 disproportionately deprives blacks and Hispanics of their right to vote in violation of the Fourteenth and Fifteenth Amendments of the Constitution and § 1973. The District Court dismissed their complaint for failure to state a claim upon which relief could be granted. *See Baker v. Cuomo,* 842 F. Supp. 718 (S.D.N.Y. 1993). A panel of this Court reversed, *see Baker v. Cuomo,* 58 F.3d 814 (2d Cir. 1995), and then reaffirmed its decision in an opinion denying the defendants' petition for panel rehearing, *see Baker v. Cuomo,* 58 F.3d 814, 824-25 (2d Cir. 1995). The *in banc* Court granted the defendants' petition for rehearing *in banc* only with respect to the § 1973 claims. *See Baker v. Cuomo,* 67 F.3d 39 (2d Cir. 1995) (*in banc*).

Baker split evenly on its disposition, the opinions in that case have no precedential effect, and the decision of the District Court was left undisturbed. *See Baker,* 85 F.3d at 921 n.2 (per curiam). Notwithstanding the significant guidance we have received from the Supreme Court on the issues presented since the opinions in *Baker* were announced, which we will consider below, the thorough and learned opinions in *Baker* help us to frame the issue once again presented for our consideration in this case.

1. Judge Mahoney's Opinion

In an opinion written by Judge Mahoney, and joined by Judges Miner, Walker, McLaughlin and Jacobs, five members of our Court concluded that § 1973 is not applicable to felon disenfranchisement statutes because such an application of § 1973 "would raise serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendments and would alter the usual constitutional balance between the States and the Federal Government." *Baker,* 85 F.3d at 922 (Mahoney, J.) (internal quotation marks and citations omitted).

In his opinion, Judge Mahoney first noted that "the 'results' test of amended § 1973 reaches conduct which is not directly violative of the Fourteenth or Fifteenth Amendments[,]" because those Amendments apply directly only to intentional discrimination. *Id.* at 926.[10] Judge Mahoney went on to describe the history and widespread acceptance of felon disenfranchisement statutes in the United

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[10] Section 1 of the Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

States. First, he explained that "felon disenfranchisement is a very widespread historical practice that has been accorded explicit constitutional recognition in § 2 of the Fourteenth Amendment," *id.* at 928, which provides in relevant part that "when the right to vote at any [federal] election . . . is denied to any of the male inhabitants of [a] state . . . or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced. . . ." U.S. Const. amend. XIV, § 2 (emphasis added). In support of the claim that felon disenfranchisement was sanctioned by the Fourteenth Amendment, Judge Mahoney relied, *Baker*, 85 F.3d at 929, on the Supreme Court's decision in *Richardson v. Ramirez,* 418 U.S. 24 (1974), in which the Supreme Court rejected a nonracial Equal Protection challenge to the felon disenfranchisement provision of California's Constitution. In so doing, the Court reasoned that the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation [in the House of Representatives] which § 2 [of the Fourteenth Amendment] imposed for other forms of disenfranchisement." *Id.* at 55.

Judge Mahoney explained further that, in enacting the Voting Rights Act in 1965 and amending the Act in 1982, Congress made no finding that felon disenfranchisement served as "a pretext or proxy for racial discrimination." *Baker,* 85 F.3d at 929. Indeed, in 1965, both Judiciary Committees stated that section 4(c) of the Voting Rights Act, 42 U.S.C. § 1973b(c)—which bans any "test or device" that limits the ability to vote to those individuals with "good moral character"—does not prohibit felon disenfranchisement statutes. *Id.* (citing S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Thomas J. Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits); H. R. Rep. No. 89-439, at 25-26 (1965) (*reprinted in* 1965

U.S.C.C.A.N. 2437, 2457). "Thus," according to Judge Mahoney, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext or proxy for racial discrimination; it has effectively determined that it has not." *Id.*

Having concluded that felon disenfranchisement statutes are sanctioned by the Fourteenth Amendment and that Congress found no history of racial discrimination through felon disenfranchisement, Judge Mahoney determined that "any attempt by Congress to subject felon disenfranchisement provisions to the 'results' methodology of § 1973 would pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." *Id.* at 930. In particular, "the application of § 1973 to state felon disenfranchisement statutes would . . . undermine the constitutional balance between the federal and state governments" because "[t]he states have the primary responsibility for regulating the times, places, and manner of conducting federal elections, U.S. Const. art. 1, § 4, cl. 1, and even more obviously for regulating elections to state office." *Id.* at 931. Judge Mahoney noted also that "[t]o the extent that the disenfranchisement of felons is designed to punish persons who violate the laws of the states, the application of § 2 to felon disenfranchisement statutes would upset the sensitive relation between federal and state criminal jurisdiction." *Id.* (internal quotation marks omitted).

Upon concluding that the application of § 1973 to felon disenfranchisement statutes might fall outside the scope of Congress's authority to enforce the Reconstruction Amendments, Judge Mahoney drew our attention to several Supreme Court decisions declining to apply a statute that alters the balance of power between the states and the federal government unless Congress provided a "clear statement" that it intended the statute to have such an effect. *Id.* at 930

(citing, *inter alia, NLRB v. Catholic Bishop,* 440 U.S. 490, 500 (1979), and *Gregory v. Ashcroft,* 501 U.S. 452, 460-61 (1991)). He then determined that "neither the statutory language nor the legislative history of § 1973 suggests Congress' *affirmative intention* to apply § 1973 to felon disenfranchisement statutes." *Id.* at 932 (emphasis added). Accordingly, Judge Mahoney concluded that the application of § 1973 to felon disenfranchisement statutes would violate the Supreme Court's "clear statement" rule. *Id.*

In sum, Judge Mahoney and the four other judges who joined his opinion concluded that, "[b]ecause it is not unmistakably clear that, in amending § 1973 in 1982 to incorporate the 'results' test, Congress intended that the test be applicable to felon disenfranchisement statutes, . . . § 1973 does not apply to § 5-106[ ]." *Id.* at 922.

2. Opinions of Judge Feinberg and Judge Newman

Five other members of our Court reached the opposite conclusion. In an opinion authored by Judge Feinberg and joined by then-Chief Judge Newman and Judges Meskill, Kearse and Fred I. Parker, Judge Feinberg rejected Judge Mahoney's view that "since 'felon disenfranchisement is a very widespread historical practice that has been accorded explicit constitutional recognition,' applying the Voting Rights Act to § 5-106 would raise 'serious constitutional questions.'" 85 F.3d at 937 (Feinberg, J.) (quoting opinion of Mahoney, J.). In rejecting that view, Judge Feinberg first questioned the significance attached by Judge Mahoney to § 2 of the Fourteenth Amendment, which appeared to Judge Mahoney implicitly to authorize felon disenfranchisement statutes. *Id.* at 936. Judge Feinberg drew our attention to *Hunter v. Underwood,* 471 U.S. 222 (1985), in which the Supreme Court held that a provision of the Alabama Constitution that disenfranchised persons convicted of crimes involving moral turpitude violated the Fourteenth Amendment because its enactment was motivated by a desire

to discriminate against blacks. In that case, Judge Feinberg noted, the Supreme Court expressed "'confiden[ce] that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the relevant provision of the Alabama Constitution] which otherwise violates § 1 of the Fourteenth Amendment.'" *Id.* (quoting *Hunter,* 471 U.S. at 233). Judge Feinberg relied also on the Supreme Court's decision in *Hunter* to assert that, contrary to Judge Mahoney's view, "felon disenfranchisement statutes often have been used to deny the right to vote on account of race." *Id.* at 938 (citing *Hunter,* 471 U.S. at 232 (concluding that the disenfranchisement statute adopted at the Alabama Constitutional Convention of 1901 purposely "selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks" in order to evade the Fourteenth Amendment)).

Judge Feinberg acknowledged the requirement set forth by the Supreme Court in *Gregory* that Congress articulate a "plain statement" when it intends to alter the state-federal balance of power, but he concluded that "the Voting Rights Act does not alter the constitutional balance between the federal government and the States." *Id.* Instead, according to Judge Feinberg, § 1973 simply implements the balance that had already been achieved by the Fourteenth and Fifteenth Amendments, which "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *Id.* (quoting *Gregory,* 501 U.S. at 468). In support of this conclusion, Judge Feinberg relied on the Supreme Court's decision in *Chisom v. Roemer,* 501 U.S. 380 (1991), which applied § 1973's "results test" to the election of state judges. Judge Feinberg noted that, despite the fact that *Chisom* was decided the very same day as *Gregory,* the Supreme Court in *Chisom* did not apply the plain statement rule when it examined the applicability of § 1973 to the election of state judges; indeed, according to

Justice Scalia, "'the possibility of applying th[e] [plain statement] rule never crossed [the Court's] mind.'" *Id.* at 938-39 (quoting *Chisom*, 501 U.S. at 412 (Scalia, J., dissenting)). Judge Feinberg concluded that, because the application of § 1973 to state judicial elections "is at least as much of an intrusion of federal authority into state affairs" as is its application to felon disenfranchisement statutes, the Supreme Court would not have applied the plain statement rule in *Baker*. *Id.* at 939.

Finally, Judge Feinberg reasoned that, even if § 1973's application to felon disenfranchisement statutes would upset the balance of power between the states and the federal government, § 1973 applies to "any citizen," a category of persons that includes incarcerated felons. According to Judge Feinberg, in light of § 1973's unambiguous and expansive reach, the provision is not required "to contain a plain statement of congressional intent to affect felon disenfranchisement." *Id.* at 940. Judge Feinberg and the four judges who joined his opinion thus "reject[ed] the argument that there is ambiguity in the Voting Rights Act that requires it to contain a plain statement of congressional intent to affect felon disenfranchisement," *id.*, and determined that § 1973 applies to felon disenfranchisement statutes.

Chief Judge Newman, in a separate opinion joined by Judge Fred I. Parker, concurred in Judge Feinberg's opinion, but also expressed some "additional thoughts." *Baker,* 85 F.3d at 941 (Newman, C.J.). Judge Newman noted that "[t]he substantive dispute between the opinions of Judge Mahoney and Judge Feinberg, upon analysis, turns out to be rather narrow." *Id.* While the two opinions agree on much, Judge Newman reasoned, "[w]here we ultimately divide is on the question whether the Voting Rights Act should be

construed to apply the 'result' test of [§ 1973] to racial discrimination among felons."[11] *Id.* at 942. He explained:

> Judge Mahoney requires a clear statement of Congressional intent because the Supreme Court in other contexts has required such a statement. But, as Judge Feinberg points out, the Supreme Court has already decided [in *Chisom*] that [§ 1973] is not subject to the plain statement rule.
>
> There is a fundamental reason why the plain statement rule does not apply in determining the coverage of [§ 1973]. The Fourteenth and Fifteenth Amendments have already altered the constitutional balance of federal and state powers, as the Supreme Court has explicitly recognized [in *Gregory*]. Moreover, the pending case presents no ambiguity as to the construction of [§ 1973].

Id. (citations omitted). Judge Newman thus concluded that "Judge Mahoney's requirement of a plain statement" is "most inappropriate." *Id.* at 943.

B. *The District Court Opinion*

After reviewing the opinions in *Baker,* the District Court in the instant case followed Judge Mahoney's opinion and concluded that § 1973 "does not limit New York's authority to disenfranchise felons under Section 5-106." *Muntaqim v.*

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[11] In stating the relevant issue as whether § 1973 may be applied to "racial discrimination *among* felons," *Baker,* 85 F.3d at 942 (Newman, C.J.) (emphasis added), Judge Newman appears to have been referring to the plaintiffs' contention in *Baker* that § 5-106 discriminates not by disenfranchising felons generally, but, rather, by disenfranchising only those felons who have been sentenced to a term of imprisonment and still remain incarcerated or on parole (as opposed to all felons and former felons, for example). *See Baker,* 85 F.3d at 937 (Feinberg, J.) ("Plaintiffs here allege that § 5-106, which disenfranchises only *some* felons, discriminates among felons *based on race.*") (emphases in original).

Coombe, No. 94-CV-1237, at 12 (N.D.N.Y. Jan. 24, 2001). The Court reasoned:

> While it is true that the Civil War Amendments such as the Fourteenth and Fifteenth Amendments, as well as the [Voting Rights Act], significantly intrude upon the authority of States in circumstances where discriminatory practices are apparent, these provisions were enacted during a time when felon disenfranchisement statutes were already firmly established and firmly recognized as an appropriate exercise of state authority. *See Baker*, 85 F.3d at 931 [(Mahoney, J.)]. Further, the Court agrees with the concerns raised by the five Judges in *Baker* who found that the application of the "results test" to a state disenfranchisement provision poses a "serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." *Baker*, 85 F.3d at 930 [Mahoney, J.]. The application of the [Voting Rights Act] to Section 5-106 seemingly works to undermine the constitutional balance that exists between federal and state governments. Consequently, an "unmistakably clear" statement by Congress stating their intention to alter this balance must be provided. *Baker*, 85 F.3d at 931 [Mahoney, J.]

Id. Having found no "unmistakably clear" statement by Congress that it intended to undermine the constitutional balance between States and the Federal Government, the District Court held that § 1973 is inapplicable to felon disenfranchisement statutes such as § 5-106.

C. *Johnson and Farrakhan*

In contrast to the District Court in the instant case, two of our sister circuits have recently held that § 1973 applies to

felon disenfranchisement statutes.[12] In *Johnson v. Governor of Florida,* 353 F.3d 1287 (11th Cir. 2003), a divided panel of the Eleventh Circuit, over a dissent by Judge Phyllis A. Kravitch, reinstated claims that the felon disenfranchisement provision of the Florida Constitution[13] violates both the Equal Protection Clause and § 1973. In reinstating the § 1973 claim, Judge Rosemary Barkett, writing for the panel, rejected the district court's conclusion that "'it is not racial discrimination that deprives felons, black and white, of their right to vote but their own decision to commit an act for which they assume the risks of detection and punishment.'" *Johnson,* 353 F.3d at 1305 (quoting *Johnson v. Bush,* 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002)). According to the Court, "[t]his conclusion . . . only begs the question. The proper question here is whether felon status 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* (quoting *Gingles*, 478 U.S. at 47). The Eleventh Circuit thus directed the district court, on

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[12] Although the Fourth and Sixth Circuits have addressed similar claims, and apparently assumed that § 1973 applies to felon disenfranchisement statutes, neither Court expressly considered whether felon disenfranchisement statutes are exempted from § 1973. *See Howard v. Gilmore,* 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. 2000) (unpublished) (dismissing claim for failure to plead that Virginia's felon disenfranchisement law either was enacted with discriminatory intent or that there was "any nexus between the disenfranchisement of felons and race") (citation to unpublished dispositions in the Fourth Circuit is "disfavored" but permissible, *see* U.S. Ct. of App. 4th Cir. Rule 36(c)); *Wesley v. Collins,* 791 F.2d 1255, 1259-61 (6th Cir. 1986) (assuming the applicability of § 1973 to state felon disenfranchisement statutes but concluding that "in the context of the 'totality of the circumstances,' it is apparent that the challenged legislation does not violate the Voting Rights Act").

[13] Unlike New York's disenfranchisement statute, which disenfranchises inmates and parolees only, the Florida Constitution *permanently* disenfranchises convicted felons unless they receive clemency. Fla. Const. art. VI, § 4.

remand, to consider plaintiffs' "evidence of discrimination in the criminal justice system" and to evaluate their § 1973 claim by "looking to the totality of the circumstances." *Id.* at 1306.

The *Johnson* majority assumed, but did not expressly state, that § 1973 applies to felon disenfranchisement statutes. By contrast, in her dissent, Judge Kravitch concluded that "the Voting Rights Act does not apply to felon disenfranchisement provisions." *Id.* at 1314 (Kravitch, J., dissenting). Judge Kravitch began by citing the "long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding." *Id.* at 1315. In light of that rule, Judge Kravitch described her preferred method of resolving the appeal as follows: "[W]e should first address whether one interpretation [of § 1973] presents grave constitutional questions where other interpretations would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent." *Id.*

Judge Kravitch went on the conclude that "the majority's interpretation creates a serious constitutional question by interpreting the Voting Rights Act to trump the text of the Fourteenth Amendment[,]" which in § 2 expressly sanctions felon disenfranchisement statutes. *Id.* Thus, Judge Kravitch looked for a statement from Congress that it intended such a result. Instead, Judge Kravitch found that "the legislative history indicates just the opposite—that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement provisions." *Id.* at 1316. Judge Kravitch observed first that the original Senate and House Reports both indicated that the VRA's bar on discriminatory tests or devices did not apply to state felon disenfranchisement laws. *See id.* Judge Kravitch also observed that, despite the amendment of the VRA in 1982, "[n]either the plain text nor

the legislative history [of the amendments] plainly declares Congress's intent to extend the Voting Rights Act to felon disenfranchisement provisions." *Id.* at 1317.

In *Farrakhan v. Washington,* 338 F.3d 1009 (9th Cir. 2003), a panel of the Ninth Circuit, like the Eleventh Circuit, held that a claim of vote denial based on Washington State's felon disenfranchisement scheme is cognizable under § 1973. Judge Richard A. Paez, writing for the panel, explained:

> Felon disenfranchisement is a voting qualification, and [§ 1973] is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the [Voting Rights Act]. 42 U.S.C. § 1973. Indeed, the Supreme Court has made clear that states cannot use felon disenfranchisement as a tool to discriminate on the basis of race, *see Hunter*[, 471 U.S. at 233], and Congress specifically amended the [Voting Rights Act] to ensure that, "in the context of all the circumstances in the jurisdiction in question," any disparate racial impact of facially neutral voting requirements did not result from racial discrimination, [S. Rep. No. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 204-05]; *see also Chisom*[, 501 U.S. at 394 & n.21].
>
> Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices. Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, [§ 1973] affords disenfranchised felons the means to seek redress.

Id. at 1016 (citation omitted).

The Ninth Circuit rejected the argument that, because Congress did not isolate racial discrimination in the criminal justice system as a relevant factor in identifying § 1973 violations,[14] § 1973 cannot be applied to felon disenfranchisement statutes. According to the *Farrakhan* Court, Congress invited the courts to consider evidence of racial discrimination in the criminal justice system when it directed them to consider, as part of the totality of the circumstances test, "'the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health.'" *Farrakhan,* 338 F.3d at 1020 (quoting S. Rep. No. 97-417, at 29). The Court reasoned that "[t]his factor underscores Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process." *Id.* Drawing on the Supreme Court's language in *Gingles*, 478 U.S. at 47, the Ninth Circuit thus concluded that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on

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[14] The Senate Report accompanying the 1982 Amendments to the Voting Rights Act identified some "typical factors" that may be relevant in determining whether, under the totality of the circumstances, a voting practice violates § 1973. These factors include: the history of voting-related discrimination in the jurisdiction; the extent to which voting in the jurisdiction is racially polarized; the extent to which the jurisdiction has used discriminatory voting practices in the past; the extent to which members of the minority group have been excluded from the candidate slating processes in the jurisdiction; the extent to which minority groups in the jurisdiction bear the effects of past discrimination in areas such as education, employment and health; the extent of the use of racial appeals in political campaigns within the jurisdiction; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *See Gingles,* 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29). These factors are not, however, "comprehensive or exclusive." *Id.* at 45.

account of race that are prohibited by [§ 1973], rendering it simply another relevant social and historical condition to be considered where appropriate." *Id.*

Over the dissent of seven judges, the Ninth Circuit denied the defendant's petition for rehearing *in banc*. *See Farrakhan v. Washington,* 359 F.3d 1116, 1116 (9th Cir. 2004) ("*Farrakhan II*"). Judge Alex Kozinski, writing for the dissenters, concluded that, by permitting the plaintiffs to bring a claim under the Voting Rights Act, "the panel lays the groundwork for the dismantling of the most important piece of civil rights legislation since Reconstruction." *Id.* at 1117. Judge Kozinski criticized the panel opinion on several grounds: First, Judge Kozinski argued that because "plaintiffs never produced a shred of evidence of *intentional* discrimination in Washington's criminal justice system," *id.* (emphasis added), but relied instead on statistical disparities in the felony conviction rates of certain minority groups in relation to the general population, the plaintiffs failed to present a genuine dispute of fact on a material issue. *Id.* at 1120. Second, and more importantly for our purposes, Judge Kozinski concluded that when Congress enacted the "results" test as part of the 1982 amendments to the VRA, "there is . . . no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement." *Id.* at 1121. Instead, according to Judge Kozinski, Congress merely preserved the exception for felon disenfranchisement that it had carved out of the VRA in 1965. *See id.* at 1120.

Finally, Judge Kozinski found that extending the VRA to reach felon disenfranchisement laws "seriously jeopardizes [the VRA's] constitutionality." *Id.* at 1121. Judge Kozinski explained first that because felon disenfranchisement statutes are endorsed in section 2 of the Fourteenth Amendment, "[t]hey are presumptively constitutional." *Id.* Indeed, "[o]nly a narrow subset of them—those enacted with an invidious, racially discriminatory purpose—is unconstitutional." *Id.*

Judge Kozinski explained further that, under the Supreme Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), and its progeny, enforcement legislation under section 5 of the Fourteenth Amendment must be supported by a record of constitutional violations. *Id.* at 1122. The enactment of the "results" test, however, was not accompanied by any legislative findings concerning the use of felon disenfranchisement in an invidious manner. In Judge Kozinski's view, "[t]he theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn't justify such a broad remedy [as section 2]." *Id.* at 1123.

D. *Analysis*

After careful consideration of the opinions in *Baker,* the decision below, and the decisions of our sister circuits, we hold that § 1973 does not apply to § 5-106. In light of relevant Supreme Court precedents, including decisions of the Supreme Court that post-date *Baker,* we believe that the application of § 1973 to § 5-106 would alter the traditional balance of power between the States and the Federal Government. Accordingly, we conclude that, in the absence of a clear statement from Congress indicating Congress's intent to infringe upon the states' authority to prohibit felons from voting, § 1973 should not be construed to extend to state felon disenfranchisement statutes. Having found no such clear statement in the language of § 1973, or even in its legislative history, we affirm the District Court's decision that Muntaqim's § 1973 claim fails as a matter of law.

1. The Clear Statement Rule

The canon of construction that is most relevant to our analysis has been called the Supreme Court's "super-strong clear statement rule." *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium,* 108 Harv. L. Rev. 26, 82 (1994). Pursuant to this rule, "[i]f Congress intends to alter the usual constitutional balance between the

States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory,* 501 U.S. at 460-61 (citations and internal quotation marks omitted). According to the Supreme Court, "[i]n traditionally sensitive areas, *such as legislation affecting the federal balance,* the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461 (citations and internal quotation marks omitted) (emphasis added). Thus, federal courts will construe a statute to alter the federal balance only when Congress expresses an "affirmative intention" to do so. *DeMarco v. Holy Cross High Sch.,* 4 F.3d 166, 169 (2d Cir. 1993).[15]

For the clear statement rule to apply here in the defendants' favor, we would need to conclude (1) that applying § 1973 to state felon disenfranchisment laws would alter the constitutional balance between the States and the Federal Government, and (2) that Congress has not made its intention to alter that balance *unmistakably clear.* Accordingly, the first step in our analysis is to determine if the application of § 1973 to state felon disenfranchisement would alter the federal balance. Assuming that § 1973 *does* raise the federalism concerns that implicate the clear statement rule, the next step is to determine if Congress has made its intent to press against constitutional boundaries unmistakably clear. Only if Congress made its intent

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[15] The clear statement rule is closely related, but not identical, to the general constitutional avoidance canon. The Supreme Court summarized the constitutional avoidance canon in *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council:* "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 485 U.S. 568, 575 (1988). A relevant difference between the clear statement rule and the constitutional avoidance canon is discussed below. *See* post, note 22.

sufficiently clear for the purposes of the clear statement rule do we need to resolve the constitutional question that divides the parties—namely, whether it is within Congress's power to ban state felon disenfranchisement statutes that do not directly violate the Reconstruction Amendments. If, on the other hand, Congress failed to make its intent sufficiently clear, we should not construe § 1973 to extend to felon disenfranchisement laws such as § 5-106.

2. The Scope of the Statute

Before we can decide whether the constitutional balance between the States and the Federal Government would be altered by the application of § 1973 to § 5-106, our first task is to determine what conduct is prohibited by § 1973. Unfortunately, it "is exceedingly difficult to discern what [§ 1973] means." *Goosby v. Town Bd.*, 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring), *cert. denied*, 528 U.S. 1138 (2000).[16] On the one hand, despite the presence of the word "results" in § 1973, it is apparent that § 1973 does not prohibit *all* voting restrictions that have a racially disproportional effect. *See Gingles*, 478 U.S. at 47 (holding that a violation of § 1973 occurs only when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives"). On the other hand, the main purpose of the 1982 amendment to the VRA was to establish that a state actor can violate the VRA without engaging in purposeful discrimination. *Id.* at 35.

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[16] Judge Leval explained that "[t]he Supreme Court has offered no definitive guidance on the role of discriminatory intent under [§ 1973]." *Goosby v. Town Bd.*, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring). In *Gingles*, in Part III.C of Justice Brennan's opinion for a plurality of the Court, four Justices interpreted § 1973 to require no showing of intentional discrimination. *See Gingles*, 478 U.S. at 61-74. But five Justices expressed different views. *See id.* at 83 (White, J., concurring); *id.* at 100-01 (O'Connor, J., concurring).

In enacting § 1973, Congress' decision to retain the words "on account of race or color" suggests "a continuing concern for race-based motivation, at least within the electorate." *See Goosby,* 180 F.3d at 499 (Leval, J., concurring). *But see* S. Rep. No. 97-417, at 27 n.109 ("Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination."). The phrase "on account of" has been defined as "for the sake of: by reason of: because of." Webster's Third New International Dictionary 13 (1976). Mere evidence of a correlation between blacks and disenfranchised felons does not indicate that black felons have been disenfranchised "by reason of" their race. Instead, such evidence proves only that a disproportional number of blacks have been disenfranchised "by reason of" their being felons. By contrast, evidence of racial discrimination in the prosecution or sentencing of felons *does* indicate that black felons' right to vote has been denied, at least in some part, "by reason of" their race. Thus, the language of § 1973, though hardly crystal clear, indicates that Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982. *See Nipper v. Smith,* 39 F.3d 1494, 1515 (11th Cir. 1994) (concluding, based on the words "on account of race or color," that "[t]he existence of some form of racial discrimination . . . remains the cornerstone of [§ 1973] claims"); *League of United Latin Am. Citizens v. Clements,* 999 F.2d 831, 850 (5th Cir. 1993) ("The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of [§ 1973] suggests, extend only to defeats experienced by voters 'on account of race or color.'").

The legislative history of § 1973 also indicates that Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982. As the Supreme Court explained in its plurality opinion in *Gingles*, 478 U.S. at 44 n.8 (citing S. Rep. No. 97-

417, at 15-16), § 1973 was intended to overturn the plurality opinion in *Bolden* and restore the version of the "results test" used in *White v. Register,* 412 U.S. 755 (1973). In *White,* the Supreme Court *retained* proof of invidious discrimination as a requirement for a successful vote dilution claim brought under the Equal Protection Clause. 412 U.S. at 765-66. However, instead of requiring the plaintiff to establish that the legislators who designed the challenged election scheme subjectively intended to discriminate, the Court concluded that a constitutional violation could also be established based on "objective factors demonstrating that the electoral scheme interacts with racial bias in the community and allows that bias to dilute the voting strength of the minority group." *Nipper,* 39 F.3d at 1520 (discussing *White,* 412 U.S. at 766-67). Based on the district court's finding that "Mexican-Americans in Texas[ ] had long 'suffered from, and continue[d] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others,'" 412 U.S. at 768 (citation omitted), the Court went on to conclude that the impact of a multimember voting district on Mexican-Americans in Bexar County, Texas, constituted invidious discrimination, *id.* at 769-70.

The *Bolden* plurality rejected the method of proving invidious discrimination endorsed in *White.* It stated instead that plaintiffs in voting rights cases, *including cases brought under § 1973,* "must prove that the disputed plan was conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." *Bolden,* 446 U.S. at 66 (internal quotation marks and citation omitted). In overturning *Bolden* by statute, Congress eliminated *Bolden's* absolute requirement that plaintiffs establish a subjective discriminatory motive on the part of legislators. It does not follow, however, that Congress, in its 1982 amendments to the VRA, also eliminated *White's* requirement that a plaintiff prove that an election law interacts with racial discrimination in order to

establish a § 1973 claim. Rather, in light of the Senate Judiciary Committee's statement that "[t]he proposed amendment to section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden,*" S. Rep. No. 97-417, at 15, the more compelling inference is that Congress intended to endorse the framework laid out in *White. See generally Nipper,* 39 F.3d at 1517-20.

Accordingly, although § 1973, as amended in 1982, plainly does not require plaintiffs to prove that legislators acted with an invidious, discriminatory purpose in enacting a challenged voting rule, we conclude that § 1973, at least in the circumstances presented here, requires some demonstrable causal connection between a challenged voting rule and purposeful racial discrimination. Because we conclude that § 1973 is not applicable to § 5-106, we need not decide exactly how a plaintiff could prove this causal connection,[17] nor do we need to determine how direct the causal connection between racial discrimination and a challenged voting rule must be to meet the requirements of § 1973. For our purposes, it is enough to conclude that, based on both the language of the amended VRA and the statute's legislative history, a plaintiff must allege that racial discrimination has caused either vote denial or vote dilution; however, a plaintiff need not allege that the specific rule or qualification at issue was itself motivated by racial bias.

In the instant case, Muntaqim, who brought this action *pro se,* alleges that "gross racial disparity in New York's prison population is caused, at least in part, by race-based

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[17] Clearly, the factors listed in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act, *see* S. Rep. No. 97-417, at 28-29, would be probative, although we do not purport to analyze the relevance of each listed factor. We also do not purport to decide what type of statistical evidence might be sufficient to support an inference that racial bias exists at any given stage in the criminal process.

disparities *in sentencing*." Pl.'s Br. at 5 (emphasis added). Muntaqim thus asserts that, *as a result of racial discrimination in sentencing,* black and Hispanic felons are more likely to be sentenced to a term of imprisonment than white felons and are therefore more likely to be disenfranchised. Were we to conclude, therefore, that § 1973 extends to felon disenfranchisement statutes such as § 5-106, it would appear that Muntaqim has stated a valid § 1973 claim, albeit a claim that might not survive summary judgment once any evidence presented by Muntaqim is tested.[18]

3. The Federal Balance

In light of our interpretation of § 1973, it is readily apparent that the statute prohibits a broader category of legislation than the Reconstruction Amendments. Specifically, in contrast to the Equal Protection Clause of the Fourteenth Amendment, the requirements of § 1973 can be satisfied *without* a showing that the specific voting rule at issue was enacted with a discriminatory purpose. In the instant case, for example, § 1973 merely requires Muntaqim to prove that he was subjected to invidious discrimination at

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[18] The defendants contended for the first time during oral argument that Muntaqim lacks standing to assert his vote dilution claim. Discriminatory vote dilution occurs when a voting practice diminishes "the force of minority votes that were duly cast and counted." *Holder,* 512 U.S. at 896. Although our *in banc* Court in *Baker* did not address whether a prisoner has standing to assert a vote dilution claim, the issue of standing was addressed by the earlier panel opinion in that case. *See Baker v. Cuomo,* 58 F.3d 814, 824 (2d Cir. 1995). The panel concluded that, because prisoners "have no vote at all . . . they do not appear to have standing to raise a vote dilution claim on behalf of themselves as incarcerated felons." *Id.* However, the panel recognized that the prisoners may be "appropriate class representatives of minority voters generally." *Id.*

Because we conclude that § 1973 does not apply to § 5-106, we do not decide, nor must the District Court decide, whether Muntaqim would be a proper class representative for the class of minority voters who allegedly experience vote dilution as a result of § 5-106.

sentencing, and does not require Muntaqim to prove that § 5-106 was enacted with a discriminatory purpose.

Because the "results" test of § 1973 reaches conduct that does not directly violate the Reconstruction Amendments, the crucial question is whether the application of § 1973 to § 5-106 is consistent with our federal system. Although our Court addressed this precise question in *Baker, see Baker,* 85 F.3d at 927 (Mahoney, J.); *id.* at 935 (Feinberg, J.); *id.* at 941 (Newman; C.J.), our task here is not simply to choose the opinion in *Baker* that we consider most persuasive. Rather, because, over the last seven years, the Supreme Court has substantially clarified the scope of Congress' enforcement power under the Reconstruction Amendments it is incumbent upon us to look beyond *Baker* in order to evaluate the issue now presented in this case, as it comes to us fully seven years after *Baker.*

It was well established when our *in banc* Court split evenly in *Baker,* as it is now, that, in exercising its enforcement powers under the Reconstruction Amendments, Congress "may constitutionally prohibit practices that are not, considered in isolation, constitutional violations, but which perpetuate the effects of past purposeful discrimination." *Baker,* 85 F.3d at 927 (Mahoney, J.); *accord id.* at 937-38 (Feinberg, J.); *id.* at 941 (Newman, C.J.). However, when *Baker* was decided, the Supreme Court had not precisely delineated the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment. Thus, in *Baker,* in order to determine whether the application of § 1973 to § 5-106 was constitutionally permissible, we had to turn principally to *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), *Katzenbach v. Morgan,* 384 U.S. 641 (1966), and *City of Rome v. United States,* 446 U.S. 156 (1980).[19] *See*

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[19] In *South Carolina v. Katzenbach,* the Supreme Court rejected a challenge to the Voting Rights Act's coverage formula. 383 U.S. 301, 337 (1966). In *Katzenbach v. Morgan,* the Court upheld a section of the

Baker, 85 F.3d at 927-28 (Mahoney, J.); *id.* at 938 (Feinberg, J.). Although each of these Supreme Court decisions stands broadly for the proposition that Congress may enforce the substantive provisions of the Reconstruction Amendments by regulating conduct that does not directly violate those provisions, none of them purported to delineate the outer boundaries of Congress's authority.

Since the *Baker* litigation was completed in 1996, the Supreme Court has repeatedly considered the scope of Congress's enforcement power under the Reconstruction Amendments. In the words of one commentator, "the Rehnquist Court has [since 1997] introduced an entirely new framework for analyzing the scope of Congress's power under Section 5 of the Fourteenth Amendment 'to enforce, by appropriate legislation, the provisions of this article.'" Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 11-12 (2003) (quoting U.S. Const. amend. XIV, § 5); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 165 (1997) (explaining that, in 1997, the Court introduced a standard that is "more rigorous than the standard of review applied in earlier Section Five cases, such as *Katzenbach v. Morgan*").

First, in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Supreme Court held that Congress may exercise its enforcement powers under the Reconstruction Amendments only when it responds to a pattern of constitutional violations with a congruent and proportional remedy.

Voting Rights Act that prevented states from denying the right to vote based on illiteracy to persons who completed sixth grade. 384 U.S. 641, 658 (1966). In *City of Rome v. United States*, the Court refused to preclear proposed changes to the voting laws of the City of Rome, Georgia, because the City could not establish that its proposed changes did not have a discriminatory effect. 446 U.S. 156, 187 (1980).

Applying the congruence and proportionality test, the Supreme Court in *City of Boerne* concluded that the Religious Freedom Restoration Act of 1993 ("RFRA")—which prohibited "[g]overnment" from "substantially burden[ing]" a person's exercise of religion unless the government could demonstrate that the burden served a compelling governmental interest and was the least restrictive means of furthering that interest—was not appropriate legislation under § 5.521 U.S. at 515-16, 536. The Court noted first that in enacting RFRA, Congress did not document any "widespread pattern of religious discrimination in this country." *Id.* at 531. The Court then held that, "[r]egardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation" because it "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

In *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 368 (2001), the Court elaborated on *City of Boerne* when it explained that Congress cannot enact "appropriate" Section 5 legislation unless it has "identified a history and pattern of unconstitutional . . . state transgressions." Under *Garrett,* it is incumbent upon Congress to document state violations of *judicially* protected rights before it enacts enforcement legislation under Section 5. *See id.* (Americans with Disabilities Act did not validly abrogate states' sovereign immunity because "[t]he legislative record . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled"); *see also Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 89 (2000) (Age Discrimination in Employment Act did not validly abrogate the states' sovereign immunity because "Congress never identified any pattern of age discrimination by the States, much less any

discrimination whatsoever that rose to the level of constitutional violation").

Accordingly, the law of federal-state relations has been significantly refined since our Court split evenly in *Baker*. Although the basic principle that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct," *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003), has not been disturbed, it is now clear that, in order for prophylactic legislation to pass constitutional muster, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Moreover, Congress must "identif[y]" the "history and pattern of unconstitutional . . . discrimination" that it seeks to redress. *Garrett*, 531 U.S. at 368. These overlapping requirements help federal courts "distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue.'" *Hibbs*, 538 U.S. at 728 (quoting *Kimel*, 528 U.S. at 81).

In applying *City of Boerne* and its progeny to the instant case, we note at the outset that we do not in any way cast doubt on Congress's authority to enact the Voting Rights Act. In a series of recent cases in which sections of federal statutes have been invalidated on the ground that they exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment, the Court has singled out the Voting Rights Act as a statute that satisfies the "congruence and proportionality" test for "appropriate legislation." *See, e.g., Garrett*, 531 U.S. at 373 (distinguishing Americans with Disabilities Act from VRA); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing Patent Remedy Act from VRA); *City of Boerne*, 521 U.S. at 526 (distinguishing Religious Freedom Restoration Act from VRA). In each of these cases,

the Court has emphasized that, when the Voting Rights Act was enacted, there was a vast and undisputed record of racial discrimination confronting Congress in the area of voting rights. *See, e.g., City of Boerne,* 521 U.S. at 530.

Moreover, we do not purport to decide whether "as a *general rule,* the 'results' methodology of § 1973 is constitutionally valid." *Baker,* 85 F.3d at 928 n.12 (Mahoney, J.) (emphasis in original). As Justice O'Connor noted in an effort to provide lower courts with "more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA," the Supreme Court has assumed—but never decided—that § 1973 is constitutional, and "lower courts have unanimously affirmed its constitutionality." *Bush v. Vera,* 517 U.S. 952, 990-91 (1996) (O'Connor, J., concurring). According to Justice O'Connor, "[Congress] believed that without the results test, nothing could be done about 'overwhelming evidence of unequal access to the electoral system,' or about 'voting practices and procedures [that] perpetuate the effects of past purposeful discrimination.'" *Id.* at 992 (quoting S. Rep. No. 97-417, at 26, 40 (citations omitted)). Justice O'Connor thus suggested that lower courts should accept and apply § 1973 "unless and until current lower court precedent is reversed and it is held unconstitutional." *Id.*

Consistent with Justice O'Connor's suggestion, the courts of appeals that have squarely addressed the issue have concluded that § 1973, on its face, meets the requirements for "appropriate legislation" under the Fourteenth and Fifteenth Amendments. *See Mixon v. Ohio,* 193 F.3d 389, 398-99 (6th Cir. 1999); *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1556-63 (11th Cir. 1984); *Jones v. City of Lubbock,* 727 F.2d 364, 372-75 (5th Cir. 1984). We do not doubt this conclusion. The question before us is not whether Congress exceeded its authority when it enacted § 1973; rather, it is whether Congress would exceed its

authority if § 1973 were applied to state felon disenfranchisement statutes.

These questions are distinct because, in our view, felon disenfranchisement statutes cannot be conflated with other facially neutral voting rules that might fall within the ambit of § 1973. First, it is indisputable that "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez,* 514 U.S. 549, 561 n. 3 (1995) (internal quotation marks and citations omitted)). Likewise, "[t]he states have the primary responsibility for regulating the times, places, and manner of conducting federal elections [under] U.S. Const. art. 1, § 4, cl. 1, *and even more obviously for regulating elections to state office.*" *Baker,* 85 F.3d at 931 (Mahoney, J.) (emphasis added). Well before *City of Boerne* was decided, the Supreme Court held that Congress exceeded its authority when it enacted an amendment to the VRA prohibiting the disenfranchisement of 18-year-olds in *state and local* elections. *See Oregon v. Mitchell,* 400 U.S. 112, 118 (1970), *superseded by* U.S. Const. amend. XXVI. Justice Black, writing for himself in a case that generated five separate opinions, explained the Court's decision as follows:

> Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections.

Id. at 130. In the absence of a record compiled by Congress establishing that felon disenfranchisement laws have been used to discriminate against minority voters, Justice Black's analysis applies as much to felon disenfranchisement laws as it does to state laws governing the minimum voting age. If New York State uses disenfranchisement merely as a tool to punish people who violate its laws, the application of § 1973

to § 5-106 would upset "'the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Enmons,* 410 U.S. 396, 411-12 (1973) (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)). Moreover, just as the mandated enfranchisement of 18-year olds would infringe upon the states' traditional authority over its own elections, so too would the application of § 1973 to state voting laws such as § 5-106.

Additionally, "[a State's] discretion to deny the vote to convicted felons is fixed by the text of § 2 of Fourteenth Amendment," *Johnson,* 353 F.3d at 1314 (Kravitch, J., dissenting), which says that a state's representation in the House of Representatives and the Electoral College will not be reduced because its felons have been disenfranchised, *see* U.S. Const. amend. XIV, § 2. In *Richardson v. Ramirez,* 418 U.S. 24, 43-52 (1974), the Supreme Court relied on Section 2 of the Fourteenth Amendment to reject a nonracial equal protection challenge to provisions of the California Constitution that permanently disenfranchise certain felons. The Court concluded "that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [the Equal Protection Clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." *Id.* at 43. The same logic applied in *Richardson* to Section 1 of the Fourteenth Amendment can be extended to Section 5. It would be anomalous if the drafters and ratifiers of the Fourteenth Amendment, despite protecting felon disenfranchisement laws from the sanction of reduced representation, would allow Congress to *prohibit* some of these laws even when they were not passed with any discriminatory intent, and in the absence of a legislative record of intentional voting rights discrimination through felon disenfranchisement. *Cf. Farrakhan II,* 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing *in banc*) (noting that felon disenfranchisement laws "are

presumptively constitutional" because they are "explicitly endorsed by the text of the Fourteenth Amendment").[20]

Finally, there is a longstanding practice in this country of disenfranchising felons as a form of punishment. When the Fourteenth Amendment was ratified, 29 of 36 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes. *Richardson,* 418 U.S. at 48. Today, as in the Early Republic, nearly every state disenfranchises felons. *See Developments in the Law: One Person, No Vote: The Laws of Felon Disenfranchisement,* 115 Harv. L. Rev.1939, 1942 (2002) (noting that, as of 2002, every state in the union besides Maine and Vermont disenfranchised felons to some extent).

The prevalence of felon disenfranchisement before the Civil War indicates that felon disenfranchisement laws in most states were not enacted to evade the Reconstruction Amendments. Judge Friendly explained the nondiscriminatory purpose of the early disenfranchisement laws as follows:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws

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[20] That is not to say that the Fourteenth Amendment, as interpreted by the Supreme Court, *guarantees* states the power to disenfranchise felons. It is clear, for example, that if a state disenfranchises felons "with the intent of disenfranchising blacks," that state has run afoul of Section 1 of the Fourteenth Amendment. *See Hunter v. Underwood,* 471 U.S. 222, 229 (1985) (invalidating disenfranchisement provision of Alabama Constitution passed with discriminatory intent); *Johnson,* 353 F.3d at 1301-02 (concluding that genuine dispute of material fact as to whether disenfranchisement provision in Florida's Constitution was enacted with a non-discriminatory purpose precluded summary judgment on Equal Protection challenge to provision).

> for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." . . . On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (citation omitted). In light of the prevalence of felon disenfranchisement laws in the Early Republic and throughout this country's history, there is no doubt that, when Congress passed the Voting Rights Act and its amendments, its members were aware of the nearly universal use of felon disenfranchisement as a punitive device. *Cf.* S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (noting that the prohibition of voting exclusions based on "moral character" has no bearing on "the frequent requirement of States . . . that an applicant for voting or registration for voting be free of conviction of a felony"). To require Congress to make its intentions with respect to felon disenfranchisement clear would not impose an unreasonable or unrealistic burden on Congress, or one that Congress it is not accustomed to meeting. *See Hibbs,* 538 U.S. at 729-32 (describing extensive record compiled by Congress to demonstrate the need for the family-care provision of the Family and Medical Leave Act). Indeed, considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them. *Cf. Dep't of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 343 (1999) (plurality opinion) ("[I]t tests the limits of reason to suggest that despite [their] silence [on the issue], Members of Congress . . . intended to enact what would arguably be

the single most significant change in the method of conducting the decennial census since its inception .").

For these reasons, we believe that § 1973 cannot be constitutionally applied to New York's felon disenfranchisement statute merely because it may be constitutionally applied to other facially neutral voting restrictions. Instead, *City of Boerne* and its progeny dictate that the application of § 1973 to § 5-106 can be upheld only if two conditions are met: First, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied [by § 1973]" and the prohibition of nondiscriminatory felon disenfranchisement laws. *City of Boerne,* 521 U.S. at 520. Second, Congress must have identified a "history and pattern of unconstitutional . . . discrimination" that would be deterred or prevented by prohibiting or limiting the power of states to disenfranchise incarcerated felons. *Garrett,* 531 U.S. at 368.

When Congress amended the Voting Rights Act in 1982, it was responding to a well-documented problem—namely, that State legislators motivated by racial animus were avoiding the strictures of the Voting Rights Act by enacting facially neutral election laws that disproportionally affected black voters. According to the Senate Report accompanying the 1982 amendments, the Voting Rights Act of 1965, rather than eliminating all discrimination in the electoral system, prompted a new wave of discrimination: "A broad array of dilution schemes were employed to cancel the impact of the new black vote." S. Rep. No. 97-417, at 6. Recognizing the continued threat of discrimination through veiled dilution schemes, and in response to the Supreme Court's narrow reading of the 1965 Act in *Bolden,* Congress decided that the goals of the Voting Rights Act could not be achieved if judicial findings of discriminatory purpose were required to establish a claim under Section 2 of the Act. *See id.* at 36.

However, by banning *all* neutral devices that "interact[ ] with social and historical conditions to cause an inequality in

the opportunities enjoyed by black and white voters[,]" *Gingles*, 478 U.S. at 47, Congress chose a blunt tool to address the problem it identified. First, as opposed to the "results" test in § 1973c,[21] which applies only in jurisdictions

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[21] The section provides, in relevant part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth [42 U.S.C. § 1973b(a)] based upon determinations made under the second sentence of [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in [42 U.S.C. § 1973b(a)] based upon determinations made under the third sentence of [42 U.S.C. § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and *will not have the effect of denying or abridging the right to vote on account of race or color,* or in contravention of the guarantees set forth in section [42 U.S.C. § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . . .

42 U.S.C. § 1973c (emphasis added). Section 1973b(b), in turn, sets forth a two-part test used to determine whether § 1973c can be applied in a specific jurisdiction. For a jurisdiction to meet the requirements of § 1973b(b), the Attorney General of the United States has to determine that the jurisdiction in question has employed at least one of four specifically enumerated tests or devices with respect to voter

that require enhanced voting rights scrutiny as a result of verifiable Executive Branch findings, the current version of § 1973 applies nationwide. Second, the current version of § 1973 makes no distinction between practices that evolved after the enactment of the Voting Rights Act and practices that predated the Voting Rights Act or even the Reconstruction Amendments. Even if § 1973, as amended in 1982, represents a "congruent and proportional" response to voting rules developed in direct response to the VRA, or to rules enacted in jurisdictions with a record of intentional voting rights discrimination, we are doubtful that § 1973 can be constitutionally applied to § 5-106. The link between the injury to be prevented by Congress—namely, the use of various dilution schemes by certain states to avoid the strictures of the VRA—and Congress's supposed remedy—namely, the prohibition of *any* felon disenfranchisement law enacted at *any* time in *any* state that "results" in the abridgement of the right to vote on account of race—is too attenuated. *See City of Boerne,* 521 U.S. at 531 (striking down statute that was "out of proportion to a supposed remedial or preventive object").

Further, *Garrett* indicates that, in order to prohibit felon disenfranchisement laws that were not enacted with a discriminatory purpose, it would be incumbent upon Congress to compile a record of intentional voting rights discrimination that could be directly deterred or prevented by invalidating those laws. *See Garrett,* 531 U.S. at 369-71; *United States v. Morrison,* 529 U.S. 598, 620-22 (2000); *cf. Oregon,* 400 U.S. at 130 (Black, J.) (invalidating voting-age provision of VRA because, *inter alia,* "Congress made no

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qualification on November 1, 1964, November 1, 1968, or November 1, 1972. Then, the Director of the Census has to determine that fewer than fifty percent of the jurisdiction's voting age population (1) was registered to vote on the coverage date, or (2) voted in the presidential election that occurred in the November that includes the coverage date. *See* § 1973b(b).

legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race"). And yet Congress has never put forward such evidence, or even *asserted* that felon disenfranchisement statutes have been used as a tool to discriminate against minority voters. *See Farrakhan II,* 359 F.3d at 1123 (Kozinski, J., dissenting from denial of rehearing *in banc*) (noting the complete absence of "evidence that states were using felon disenfranchisement in a purposeful, invidious manner" prior to 1982). Rather, "the *only* consideration of felon disenfranchisement statutes in the entire history of the Voting Rights Act . . . is Congress' explicitly announced intention *to exclude* such statutes from the § 1973b(c) tabulation of prohibited tests and devices." *Baker,* 85 F.3d at 932 (Mahoney, J.) (second emphasis added); *see also Johnson,* 353 F.3d at 1316-17 (Kravitch, J., dissenting) (explaining that both the House and Senate Reports on the original Act indicated that the VRA was not designed to apply to felon disenfranchisement). Ultimately, the best evidence available that felon disenfranchisement has been used to discriminate based on race comes not from Congress but from the Supreme Court, which concluded in *Hunter* that the disenfranchisement provision of the State of Georgia's Constitution, *passed in 1901,* was enacted with discriminatory intent. 471 U.S. at 233. Although this evidence might be sufficient to support the regulation of disenfranchisement laws in Georgia, notwithstanding the absence of congressional findings, we do not think it is sufficient to support the regulation of felon disenfranchisement scheme in *all* fifty States. *See Morrison,* 529 U.S. at 626 (holding that Violence Against Women Act was not a legitimate exercise of Congress' authority under Section 5 in part because "it applie[d] uniformly throughout the Nation" and "Congress' findings indicate that the problem of discrimination against the victims of gender- motivated crimes does not exist in all States, or even most States"); *see also Farrakhan II,* 359

F.3d at 1124 (Kozinski, J., dissenting from denial of rehearing *in banc*) ("The Supreme Court has emphasized that enforcement legislation should be geographically targeted when the threat of violations varies from place to place.").

In sum, we are not convinced that "there [is] a congruence and proportionality between the injury to be prevented or remedied," *i.e.*, the use of vote denial and dilution schemes to avoid the strictures of the Voting Rights Act of 1965, "and the means adopted to that end," *i.e.*, prohibition of state felon disenfranchisement laws that result in vote denial or dilution but were not enacted with a discriminatory purpose. *City of Boerne*, 521 U.S. at 520. Moreover, even if there were a sufficient nexus between the injury to be prevented by § 1973 and the application of § 1973 to § 5-106, Congress has not identified a "history and pattern of unconstitutional . . . discrimination" through felon disenfranchisement that would support the prohibition of statutes such as § 5-106. *Garrett*, 531 U.S. at 368. Based on these conclusions, it is apparent to us that the application of § 1973 to § 5-106 would disturb the balance of power between the States and the Federal Government, as conceived by the Supreme Court.

4. Congress's Statement of Intent

Because we have concluded that the application of § 1973 to § 5-106 would alter the federal balance, the next question is whether Congress made its intention sufficiently clear that we need to address the constitutional issue posed in this case. In applying the clear statement rule, the Supreme Court has asked whether Congress has made its intent to alter the federal balance "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Based on this formulation, we conclude that the clear statement rule applies with full force to this case, and that § 1973 cannot be used to invalidate § 5-106.

The clear statement rule prevents Congress from altering the federal balance unless it expresses an "affirmative intention" to do so. *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993); *see also Gregory*, 501 U.S. at 460 (demanding that Congress make its intention "unmistakably clear in the language of the statute" (internal quotation marks and citations omitted)). Thus, in *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979), the Supreme Court, invoking the clear statement rule, concluded that the National Labor Relations Board lacked jurisdiction over lay faculty members at Catholic high schools even though the Board had jurisdiction over "employers," and the term "employer" in the National Labor Relations Act, 29 U.S.C. § 152(2), clearly did not exempt church-operated schools. The Court determined that, because the application of the statute to church-operated schools would raise "serious First Amendment questions," *id.* at 504, and Congress had made no specific, affirmative statement of its desire to raise those sensitive questions, *see id.*, the statute should be construed not to extend to church-operated schools.

Similarly, in *Gregory*, Missouri state court judges sought to invoke the federal Age Discrimination in Employment Act of 1967 ("ADEA"), *as amended*, 29 U.S.C. §§ 621-634, to invalidate a provision of the Missouri Constitution that compelled judges to retire at age seventy. *See Gregory*, 501 U.S. at 455. Notwithstanding the ADEA's application to all state "employees," and the Court's observation that an exception applicable to "appointee[s] on the policymaking level" did not, on its face, seem to include judges, *id.* at 467 (noting that including judges in that category would be "an odd way for Congress to exclude judges" from the reach of the statute), the Court rejected the judges' ADEA claim.

The *Gregory* Court, unlike the *Catholic Bishop* Court, suggested that a statute must be "ambiguous" before the clear statement rule can be applied to it. *Id.* at 470. However,

the Court found that the word "employee," despite is ordinary meaning, is sufficiently ambiguous *for the purposes of the clear statement rule.* The Court reasoned that, "[i]n light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included." *Id.* The *Gregory* Court thus suggested that when sweeping language in a statute would alter the federal balance were it given its full effect, that language should not be construed to alter the federal balance in the absence of a clear statement where Congress has otherwise indicated that it did not intend to achieve such a drastic result. This formulation of the clear statement rule is slightly different from the formulation in *Catholic Bishop,* according to which the clear statement rule applies whenever a statute alters the federal balance; however, as explained presently, the clear statement rule applies in the instant case under either formulation of the rule.

Like the Supreme Court in both *Catholic Bishop* and *Gregory,* we are faced with a statute, *i.e.,* § 1973, that sweeps broadly over a wide range of government conduct. Moreover, for the reasons laid out above, that statute would alter the federal balance if it were applied to felon disenfranchisement laws. Accordingly, under *Catholic Bishop,* § 1973 should not be applied to felon disenfranchisement laws in the absence of an unmistakably clear statement.

Under *Gregory,* the clear statement rule also applies with full force in the instant case, because there is ample evidence that Congress did not intend to prohibit felon disenfranchisement statutes when it enacted and amended the VRA. Indeed, as Judge Kravitch explained in her dissent in *Johnson,* the legislative history of the VRA and its amendments suggests that, were Congress to have considered the issue, it would have declined Muntaqim's invitation to apply § 1973 to § 5-106. *See Johnson,* 353 F.3d at 1317-18

(Kravitch, J., dissenting); *see also Farrakhan II,* 359 F.3d at 1120 (Kozinski, J., dissenting from denial of rehearing *in banc*) (concluding that "the VRA was never intended to reach felon disenfranchisement laws"). In 1965, both the House and the Senate Judiciary Committee Reports stated that section 4(c) of the Voting Rights Act, 42 U.S.C. § 1973b(c)—which bans any "test or device" that limits the ability to vote to those individuals with "good moral character"—does not prohibit felon disenfranchisement statutes. *See* S. Rep. No. 89-162, at 24; H. R. Rep. No. 89-439, at 25-26. In 1982, moreover, Congress did not indicate in any way that it wanted to bring felon disenfranchisement laws within the scope of the VRA, notwithstanding the prevalence of felon disenfranchisement laws. *See Johnson,* 353 F.3d at 1317-18 (Kravitch, J., dissenting) (noting that "[t]he Senate Report [in 1982], which goes into great detail on legislative intent, made no mention of felon disenfranchisement provisions"); *Farrakhan II,* 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing *in banc*) ("There is . . . no evidence that Congress had changed its mind about the legitimacy of felon disenfranchisement when it enacted section 2."). Thus, although Congress has not expressly stated that § 1973 does not apply to felon disenfranchisement statutes, the one-sided legislative history of the VRA is sufficient to raise serious doubts about whether the statute can be applied to felon disenfranchisement statutes. Under *Gregory,* in which the Supreme Court applied the clear statement rule without such specific evidence that Congress intended to exclude state judges from the scope of the ADEA, the clear statement rule controls.[22]

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[22] By contrast, we are not certain that the general constitutional avoidance canon would apply in the instant case. Unlike the clear statement rule, which requires an *affirmative* statement of Congress's intent, the doctrine of constitutional avoidance merely requires "the absence of statutory ambiguity.'" *HUD v. Rucker,* 535 U.S. 125, 134 (2002) (quoting *United States v. Oakland Cannabis Buyers' Coop.,* 532

Our view is not altered by the fact that, in *Chisom v. Roemer,* 501 U.S. 390 (1991), the Supreme Court did not apply the clear statement rule before determining that the results test of § 1973 applies to the election of state judges. We are persuaded by the explanation offered by Judge Mahoney, who concluded that the *Chisom* Court's failure to mention the clear statement rule cannot be construed to mean that the rule should never be applied. As Judge Manoney explained:

> Relying upon *Chisom,* Judge Feinberg states that "we have clear Supreme Court authority that the plain statement rule does *not* apply when determining coverage under § 2 of the Voting Rights Act." Upon closer examination, this "clear . . . authority" turns out to be the Supreme Court's failure, without so much as a reference to the plain statement rule, to apply the rule in *Chisom,* a case involving the interpretation of the Voting Rights Act. *See* 501 U.S. at 390-404. In light of the unequivocal language in *Gregory* that the plain statement rule does apply in the context of legislation passed pursuant to the enforcement clauses of the Civil War Amendments, we decline to interpret this omission—made without any attempt to distinguish *Gregory*—as an instruction to the lower courts to refrain from applying *Gregory* in the context of the Voting Rights Act.

U.S. 483, 494 (2001)). Section 1973, while vague, does not seem ambiguous. It states that "*[n]o* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of *any citizen* of the United States to vote on account of race or color." 42 U.S.C. § 1973 (emphases added).

Although we doubt that the general avoidance canon would apply in the instant case, we need not decide that issue. Because we conclude that the Supreme Court's clear statement rule precludes Muntaqim's Voting Rights Act claim, there is no need to go through the academic exercise of applying another canon of construction.

Baker, 85 F.3d at 932 (Mahoney, J.). Additionally, we respectfully disagree with the view that "application of § 2 of the Voting Rights Act to state judges, a result that can change district boundaries, is at least as much of an intrusion of federal authority into state affairs as the effort of plaintiffs here to apply § 2 in a way that, at most, might permit some felons to vote." *Id.* at 939 (Feinberg, J.). For the reasons explained above, we believe that felon disenfranchisement statutes—in light of their longstanding and widespread acceptance throughout the country, as reflected in the text of the Fourteenth Amendment—enjoy a presumption of constitutionality that is not necessarily attached to other voting rules.

Thus, in these circumstances, we conclude that the clear statement rule is applicable, despite the fact that, on its face, § 1973 extends to all voting qualifications. *Cf. Chisom,* 501 U.S. at 411 (Scalia, J., dissenting) (noting that "in some circumstances," the clear statement rule "counter[s] ordinary meaning"). Because we find that Congress did not make an unmistakably clear statement that § 1973 applies to state felon disenfranchisement statutes, we will not apply § 1973 to § 5-106.

IV. *Immunity*

To the extent that Muntaqim's complaint alleges claims against the defendants in their personal capacities, the complaint can be dismissed on the separate ground that defendants are entitled to qualified immunity. In light of our split decision in *Baker,* it was objectively reasonable for them to have believed that § 5-106 could be lawfully enforced. *See, e.g., Mandell v. County of Suffolk,* 316 F.3d 368, 385 (2d Cir. 2003) (a state official is entitled to qualified immunity "if it would have been objectively reasonable for the official to believe that his conduct did not violate plaintiff's rights"). Accordingly, Muntaqim's request for $5,000,000 in compensatory and punitive damages from

defendants in their personal capacities would not survive a motion to dismiss even if we reached a different conclusion regarding the scope of § 1973.

Muntaqim's suit is also barred by the Eleventh Amendment to the extent that Muntaqim seeks damages against the defendants in their official capacities. *See, e.g., Ford v. Reynolds,* 316 F.3d 351, 354 (2d Cir. 2003) ("The Eleventh Amendment bars the award of money damages against state officials in their official capacities."); *see also Edelman v. Jordan,* 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment is "a jurisdictional bar" that "need not be raised in the trial court"). However, the defendants are not entitled to either Eleventh Amendment immunity or qualified immunity from suit insofar as Muntaqim seeks to enjoin state officials from enforcing § 5-106. *See Frew ex rel. Frew v. Hawkins,* 124 S.Ct. 899, 903 (2004) (excepting from the Eleventh Amendment suits for prospective, injunctive relief that allege an ongoing violation of federal law (citing *Ex Parte Young,* 209 U.S. 123 (1908))); *African Trade & Info. Ctr., Inc. v. Abromaitis,* 294 F.3d 355, 360 (2d Cir. 2002) (noting that qualified immunity is inapplicable to claims for injunctive relief). Accordingly, as opposed to his other requests for relief, which suffer from multiple deficiencies, Muntaqim's request for prospective injunctive relief is barred solely because § 1973 does not apply to § 5-106.

CONCLUSION

Based on recent decisions of the United States Supreme Court, we conclude that § 1973 would alter the constitutional balance between the States and the Federal Government if it were construed to extend to state felon disenfranchisement statutes such as § 5-106. In the absence of a clear statement from Congress to support that construction of the statute, we hold that § 1973 does not extend to § 5-106, and affirm the judgment of the District Court.

This case raises a difficult question regarding the applicability of the Voting Rights Act's "results" test to a New York statute that disenfranchises currently incarcerated felons and parolees. More broadly, it also asks us to evaluate the impact of *City of Boerne* and its progeny on Section 2 the Voting Rights Act, and to apply the clear statement rule in an unfamiliar context. Accordingly, all three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JALIL ABDUL MUNTAQIM, a/k/a
ANTHONY BOTTOM,

Plaintiff,

94-CV-1237

vs.

PHILLIP COOMBE; ANTHONY
ANNUCCI; LOUIS F. MANN,

Defendants.

APPEARANCES: **OF COUNSEL:**

FOR THE PLAINTIFF:

JALIL ABDUL MUNTAQUIM
Plaintiff *Pro Se*
77A4283
Auburn Correctional Facility
P.O. Box 618
Auburn, New York 13024

FOR THE DEFENDANTS:

HON. ELLIOT SPITZER
Attorney General of the State of
New York
Attorney for Defendants
The Capitol
Albany, New York 12224

RICHARD J. FRESHOUR,
ESQ.
Assistant Attorney General

HON. NORMAN A. MORDUE
UNITED STATES DISTRICT
JUDGE

MEMORANDUM-DECISION AND ORDER

Plaintiff Jalil Abdul Muntaquim, a pro se litigant incarcerated under the custody of the New York State Department of Correctional Services (hereafter "DOCS"), commenced this action pursuant to 42 U.S.C. § 1981, 1983, and 1985 and the First, Fifth, Eighth, Fourteenth and Fifteenth Amendments to the United States Constitution, on September 26, 1994.[1] Plaintiff asserts that specific New York State statutes governing the disenfranchisement of felons, the issue of "civil death" and the award of "good time" credits to inmates, are unconstitutional. Plaintiff seeks declaratory, injunctive, and monetary relief.

Presently before the Court for consideration is the July 18, 2000 Report-Recommendation of United States Magistrate Judge Gustave J. Di Bianco concerning defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In his report, Magistrate Judge Di Bianco recommends that defendants' motion be granted and that this action be dismissed in its entirety. Following ten days from the service of the report-recommendation, the clerk of the court has forwarded the entire file for a final determination of defendants' motion. Included in the file are the timely objections to the Magistrate Judge's Report-Recommendation submitted by plaintiff.

In his objections, plaintiff makes clear his opposition to each of the recommendations of the Magistrate Judge. Plaintiff asserts, among other things, that it is "apparent ... [that] Magistrate [Judge] Di Bianco failed to regard plaintiff's complaint as being factual and true." As such, plaintiff asserts that the Magistrate Judge's recommendations were made without drawing every reasonable inference in

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[1] The defendants named by plaintiff are all DOCS employees.

favor of the plaintiff, as required by Rule 56 of the Federal Rules for Civil Procedure. Because plaintiff has clearly objected to each of Magistrate Judge's recommendations, this Court undertakes a careful de novo review of the entire file. In so doing, the Court draws its own conclusions as to the ultimate disposition of defendants' motion for summary judgment. See 28 U.S.C. § 636(b).

After conducting such a review, the Court agrees with the recommendations of Magistrate Judge Di Bianco and dismisses this action in its entirety.

BACKGROUND

Plaintiff, an African American male, asserts that several New York State provisions violate his constitutionally-protected rights. First, plaintiff avers that Section 5-106 of the New York State Election Law, a statute that denies the right to vote in state and federal elections to individuals convicted of felonies, violates the Voting Rights Act of 1965, the Fourteenth and Fifteenth Amendments to the United States Constitution, and the New York State Constitution.

In his next claim, plaintiff asserts that Section 79-a of the New York State Civil Rights Law is discriminatory. Section 79-a mandates that a person sentenced to life imprisonment is considered civilly dead. As a corollary to this claim, plaintiff argues that if he is to be considered civilly dead, then at the very least, his family should be entitled to the appropriate "benefits."

Third, plaintiff asserts that Sections 803 and 805 of the New York State Corrections Law are unconstitutional. Specifically, plaintiff avers that Section 803 violates the Fourteenth Amendment's Equal Protection Clause because it prohibits inmates serving life sentences from accumulating

good time credits. Although not explicitly, plaintiff also relies on the Fourteenth Amendment's Equal Protection provision in buttressing his claims against Section 805, asserting that the section – which governs the "earned eligibility program" – is unconstitutional because it prevents inmates who are serving a minimum sentence of more than six years from participating in the program. As such, plaintiff contends that he is "being discriminated against and [is] prevented from enjoying the benefits of a program that may ensure parole release at the completion" of a minimum period of eligibility.

DISCUSSION

A. The Standard for Summary Judgment

Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See Raskin v. Wyatt Co., 125 F.3d 55, 59 (2d Cir. 1997).

When analyzing a motion for summary judgment it is incumbent upon the court to determine, as a threshold matter, whether an issue of material fact that requires trial is present. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 243 (1986). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.; Roytar v. Union Bank of Switzerland, 852 F. Supp. 180, 182 (S.D.N.Y. 1994). In determining whether such a question of fact is raised, the court must make all credibility assessments, resolve any ambiguities, and draw all inferences in favor of the non-moving party, and may grant the motion only if the evidence, taken in that light, reflects that there is no genuine issue of

material fact and that the moving party is entitled to judgment as a matter of law. Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994).

Given these principles, a nonmoving party cannot survive a motion for summary judgment merely by relying on the allegations contained in pleadings. See Corselli v. Coughlin, 842 F.2d 23, 25 (2d Cir. 1988). Instead, the nonmoving party must establish more than merely "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

While pro se plaintiffs are entitled to special latitude when defending against summary judgment motions, see Jemzura v. Public Service Commission, 961 F. Supp. 406, 415 (N.D.N.Y. 1997) (McAvoy, C.J.), they must still provide the court with "concrete evidence from which a reasonable juror could return a verdict in [the pro se plaintiff's] favor." Anderson, 477 U.S. at 256. Evidence which is merely conclusory or not significantly probative is insufficient to withstand a summary judgment motion. Id., at 249.

B. Plaintiff's Disenfranchisement Claims

Plaintiff claims that the defendants' application of § 5-106 of the New York State Election Law[2]

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[2] Section 5-106 is the State of New York's Felon Disenfranchisement provision. In relevant part, the language of the statute states:

> 2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a

unconstitutionally violates protections explicit in the Voting Rights Act of 1965. Plaintiff also states that Section 5-106 is violative of the Fourteenth and Fifteenth Amendments[3] as well as the New York State Constitution. The Court will address each of plaintiff's claims independently.

1. New York State Election Law § 5-106 and the Voting Rights Act

The initial question for the Court's determination is whether, notwithstanding plaintiff's allegations of unconstitutionality, the Voting Rights Act is even an appropriate limitation on New York State's felon disenfranchisement power. Before addressing this crucial issue, however, a brief overview of the Voting Rights Act's history and statutory language will be helpful.

A. The Voting Rights Act of 1965

The Voting Rights Act of 1965, 42 U.S.C. § 1973 (hereafter "VRA"), was enacted by Congress in an effort to rid "the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).[4] The

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> provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. ELECT. LAW § 5-106(2).

[3] Although not explicit in his complaint, plaintiff seemingly attempts to challenge Section 5-106 as unconstitutional under the Fourteenth or Fifteenth Amendments to the United States Constitution. However, as will be seen, plaintiff has not established evidence to withstand summary judgment on either of these possible claims.

[4] In the aftermath of the Civil War and the ratification of the Fifteenth Amendment, several states, located primarily in the south, enacted voting standards or requirements that while facially neutral, had the realistic effect of denying the right to vote essentially on the basis of

VRA attempts to accomplish its goal of racial equality in voting through the prohibition of any "voting qualification or prerequisite to voting or standard, practice, or procedures ... which results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." Thornburg v. Gingles, 478 U.S. 30, 35 (1986).[5] The VRA, therefore, defends against discriminatory actions of a state that *results* in voting denial or dilution based on race. See White v. Regester, 412 U.S. 755 (1973) (emphasis added).

This so called "results test" is detailed in Subsection a and b of Section 1973.[6] According to Subsection (b), a

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race. The VRA was enacted as means to end these states' "unremitting and ingenious defiance of the Constitution." South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[5] As originally adopted by Congress, the VRA only prohibited the imposition or application of voting requirements that "den[ied] or abridge[d] the right of any citizen of the United States to vote on account of race or color." Baker v. Pataki, 85 F.3d 919, 925 (2d Cir. 1996). Consequently, the VRA could be utilized to prohibit a facially-neutral state action, but only when the action could be seen as "motivated by a discriminatory purpose." City of Mobile v. Bolden, 446 U.S. 55, 62 (1980). The discriminatory intent requirement of the VRA was abolished by Congressional amendment in 1982. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134. Accordingly, a state's discriminatory motive in enacting a particular statute is no longer viewed as a relevant consideration in determining the applicability of the VRA.

[6] Subsections a and b of Section 1973 state:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

violation of the "results test" occurs if, based upon the totality of the circumstances, a court determines that the process leading to the nomination or election of an official was not equally open to members of the class of protected citizens listed in subsection (a). See 42 U.S.C. § 1973(b).

B. VRA's Applicability to Section 5-106

While a state's general constitutional right to disenfranchise felons is well established[7], see Richardson v.

> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstances which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

[7] This disenfranchisement power is found in Section 2 of the Fourteenth Amendment. Section 2, in relevant part, states:

> Representatives shall be apportioned among the several States according to their respective numbers. ... But when the right to vote ... is denied ... or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced

U.S. CONST. amend. XIV, § 2.

Ramirez, 418 U.S. 24, 53 (1974), this Court must determine whether Section 5-106's disenfranchisement provisions form a prerequisite, qualification or standard that hinders voting, as contemplated by the VRA, and whether the enforcement of Section 5-106 serves to deny or abridge the right to vote on the basis of race.

Although felon disenfranchisement statutes such as Section 5-106 have been the subject of prior litigation, the question of the VRA's applicability to Section 5-106 remains an open question. The Second Circuit's most recent decision addressing this issue, Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996), offers no precedential value. In that case, an en banc panel split evenly on the question of whether disenfranchised felons could state a claim under the VRA. Each side of the divided court filed an opinion outlining its reasoning. Although the divided court's decision effectively upheld the district court's original dismissal, the Circuit unanimously determined that because the court was evenly divided on the merits of the appeal, the separate opinions in the case imputed no precedential effect. See Baker, 85 F.3d at 921, n. 2. Accordingly, the opinions are helpful only to the extent that they characterize the prevailing issues.

C. Baker v. Pataki

Writing collectively for the five judges who deemed the VRA inapplicable to Section 5-106, Judge Mahoney found that "the application of § 1973 to state felon disenfranchisement statutes would ... undermine the constitutional balance between the federal and state governments." Baker, 85 F.3d at 931. Judge Mahoney asserted that while it is clear that the "Civil War Amendments and the Voting Rights Act significantly intrude upon this state authority when discriminatory practices are apparent," the provisions were enacted at a time in which felon disenfranchisement statutes like Section 5-106 were

common as States exercised the authority explicit in Section 2 of the Fourteenth Amendment. Id. As such, the Second Circuit has long recognized that "felon disenfranchisement laws are generally enacted for compelling, nondiscriminatory reasons." Baker, 85 F.3d at 929-30 (citing Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), cert denied, 389 U.S. 1048 (1968)).[8]

In light of this type of historical and constitutional background, and in an effort to preserve the delicate balance between state and federal power, Judge Mahoney determined that if the intended result of a congressional enactment would alter the ordinary constitutional balance existing between the States and the Federal Government, Congress must make evidence of this desire "unmistakably clear in the language of the statute." Baker, 85 F.3d at 930 (citations omitted). Therefore, when Congress fails to make a clear indication in the statute of its desire to disrupt the normal constitutional balance, the congressional enactment should

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[8] Writing for the Second Circuit in Green v. Board of Elections, Judge Henry Friendly looked to the work of John Locke to support the constitutionality of the states' disenfranchisement rights, stating:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.

Green, 380 F.2d at 451-52.

not be construed by the courts as altering the existing balance of power. See id. at 931 (citing Gregory v. Ashcroft, 501 U.S. 452, 466-67 (1991)).

Turning to the VRA, Judge Mahoney concluded that the provision's silence concerning the issue of felon disenfranchisement signified the absence of a clear or plain statement setting forth Congress' intent to change the established balance of governmental power. As such, Judge Mahoney concluded that Congress, in the enactment of the VRA or any of its amendments, did not intend the VRA provisions to be applicable to felon disenfranchisement statutes like Section 5-106. See Baker, 85 F.3d at 932-33.

Writing for the other five judges on the en banc panel, Judge Feinberg found the VRA applicable to Section 5-106. Judge Feinberg emphasized that while the right of the several states to disenfranchise felons is explicit in the Constitution, the use of felon disenfranchisement statutes to impose purposeful racial discrimination should be strictly prohibited. See Baker, 85 F.3d at 938. According to Judge Feinberg, Congress enacted the VRA as a means to combat discriminatory practices in voting, and as such, "[d]isenfranchisement based on race is a historical practice that the Voting Rights Act seeks to eradicate." Id. Judge Feinberg relied on the Supreme Court's decision in Hunter v. Underwood, 471 U.S. 222 (1985), where a provision in the Alabama State Constitution that disenfranchised those who had committed "any crime ... involving moral turpitude" was found to be unconstitutional. In invalidating the provision based on intentional discrimination, the Supreme Court in Hunter addressed Section 2 of the Fourteenth Amendment, stating "[w]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation" of the Alabama Constitution. See Baker, 85 F.3d at 936 (quoting Hunter, 471 U.S. at 233).

Judge Feinberg also took issue with Judge Mahoney's application of the plain statement rule. Contrary to Judge Mahoney's determination that a plain statement by Congress is required in order to alter the traditional balance existing between federal and state governments, Judge Feinberg found that the VRA did nothing to alter the normal constitutional balance that was previously established after the enactment of the Fourteenth and Fifteenth Amendments.[9] See Baker, 85 F.3d at 938 (citing Gregory, 501 U.S. at 460). Finally, Judge Feinberg stated that the plain statement rule endorsed by Judge Mahoney is not applicable to the VRA, as the plain statement rule only applies to ambiguous statutes and the VRA is a clear enactment of congressional intent. Baker, 85 F.3d at 938-39.

D. Interpretation of the VRA by Other Courts

Courts outside the Second Circuit who have dealt with the applicability of similar felon disenfranchisement statutes have also arrived at differing views. In Howard v. Gilmore, No 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000), a recent unreported decision, the Fourth Circuit found the VRA not applicable to felon disenfranchisement statutes. The court determined, like the Second Circuit panel led by Judge Mahoney, that the "Fourteenth Amendment itself permits the denial of the franchise upon criminal conviction." Id. The Fourth Circuit further found the VRA inapplicable to the State's right to disenfranchise felons based on the fact that the States' "exclusion of felons from

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[9] Judge Feinberg noted that in Gregory, the United States Supreme Court found that "[t]he Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." Baker, 85 F.3d at 938 (quoting Gregory, 501 U.S. at 468).

the franchise pre-dates the enfranchisement of African-Americans." Id.

In contrast, the Sixth Circuit, like the Second Circuit panel led by Judge Feinberg, has found the VRA applicable to felon disenfranchisement statutes. See Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986). In the context of an inmate's challenge to Tennessee's felon disenfranchisement law, the Sixth Circuit found that while the VRA does apply to disenfranchisement statutes, the disenfranchised felon's case was nevertheless appropriately dismissed by the district court based on the totality of the circumstances. The court found that while evidence of discrimination was present, "such evidence of past discrimination 'cannot, in the manner of original sin, condemn action that is not in itself unlawful.'" Wesley, 791 F.2d at 1261 (citing City of Mobile v. Bolden, 446 U.S. 55, 74 (1980). The Sixth Circuit found that the state of Tennessee had a "legitimate and compelling rationale for enacting" its felon disenfranchisement law, stating that it was "undisputed that a state may constitutionally disenfranchise convicted felons" and that a felon's right to vote is not fundamental. See id. (citations omitted). The court also gave weight to the fact that the "disenfranchisement of felons has never been viewed as a device by which a state could discriminatorily exclude a given racial minority from the polls." Wesley, 791 F.2d at 1262.

E. VRA's Applicability to Section 5-106

Notwithstanding the sharply divided decision in Baker v. Pataki and the general disagreement existing among other Circuit Courts, this Court finds, after careful consideration, that the VRA does not limit New York's authority to disenfranchise felons under Section 5-106. While it is true that Civil War Amendments such as the Fourteenth and Fifteenth Amendments, as well as the VRA, significantly

intrude upon the authority of States in circumstances where discriminatory practices are apparent, these provisions were enacted during a time when felon disenfranchisement statutes were already firmly established and firmly recognized as an appropriate exercise of state authority. See Baker, 85 F.3d at 931. Further, the Court agrees with the concerns raised by the five Judges in Baker who found that the application of the "results test" to a state disenfranchisement provision poses a "serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." Baker, 85 F.3d at 930. The application of the VRA to Section 5-106 seemingly works to undermine the constitutional balance that exists between federal and state governments. Consequently, an "unmistakably clear" statement by Congress stating their intention to alter this balance must be provided. Baker, 85 F.3d at 931.

Because this Court finds the VRA inapplicable to Section 5-106, a discussion of the merits of this portion of plaintiff's claim is unnecessary.

2. Plaintiffs Other Disenfranchisement Claims

A. Fourteenth and Fifteenth Amendments

Plaintiff also asserts that Section 5-106 violates both the Fourteenth and Fifteenth Amendments. While the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedures ... which results in a denial or abridgement of the right of any citizen ... to vote on account of race or color," 42 U.S.C. § 1973; Thornburg, 478 U.S. at 35, the Fourteenth and Fifteenth Amendments only apply to intentional discriminatory conduct. Thus, plaintiff must offer evidence that discrimination was a motivating factor in the enactment of Section 5-106 to sustain a

Fourteenth or Fifteenth Amendment challenge. See Village of Arlington Heights v. Metro. Corp., 429 U.S. 252, 265 (1977). Short of wholly conclusory statements in his verified complaint, plaintiff has failed to provide the Court with any direct or circumstantial evidence in support of his claims. In the absence of evidence supporting plaintiff's allegations of discriminatory intent on the part of the New York State Assembly in enacting Section 5-106 or on the part of the DOCS in the application of the statute, plaintiff's disenfranchisement claims pursuant to the Fourteenth and Fifteenth Amendments are necessarily dismissed Id.

B. New York State Constitution

Finally, plaintiff avers that the application of Section 5-106 is also violative of the New York State Constitution. Specifically, plaintiff asserts that Section 5-106 is inconsistent with constitutional provisions providing for equal protection of the law and providing that the right to vote not be denied on the account of race. Magistrate Judge Di Bianco has recommended that the Court dismiss this claim because Section 5-106 does not operate to deny the right to vote based on race but rather upon the conviction of a felony.

While the Court agrees with Magistrate Judge Di Bianco's analysis, the Court need not reach this issue since it has dismissed all of plaintiff's federal disenfranchisement claims. Consequently, the Court declines to exercise supplemental jurisdiction over this pendent state claim under the New York State Constitution. See Castellano v. Board of Trustees, 937 F.2d 752, 758 (2d Cir.), cert. denied, 502 U.S. 941 (1991) ("[I]f the federal claims are dismissed before trial, even though, not insubstantial in a jurisdictional sense, the state claims should be dismissed as well").

C. **Plaintiff's "Civil Death" Claim - New York State Civil Rights Law § 79-a**

Plaintiff next avers that Section 79-a of the New York Civil Rights Law is unconstitutional because it prohibits him from engaging or contracting in business transactions, specifically an opportunity to incorporate.

Section 79-a of the New York States Civil Rights Law states in relevant part:

> 1. Except as provided [in other portions of section concerning judicial proceedings], a person sentenced to imprisonment for life is thereafter deemed civilly dead; provided, that such a person may marry while on parole, or after he has been discharged from parole, if otherwise capable of contracting a valid marriage. A marriage contracted pursuant to this section by a person while he is on parole, without prior written approval of the board of parole, shall be ground for revocation of the parole. This section shall not be deemed to impair the validity of a marriage between a person sentenced to imprisonment for life and his spouse.

N.Y. CIVIL RIGHTS LAW § 79-a(1) (McKinney 2000). Aside from exceptions for judicial proceedings and providing for a limited right to marry, Section 79-a mandates that persons incarcerated for life are "civilly dead." Therefore, the right to contract or otherwise incorporate is seemingly impaired by the statute's overarching civil death provision. Accordingly, plaintiff argues that the statute is "void of

reasoning or rationality" and thus unconstitutional. The Court disagrees.

It is well established in our constitutional history that the Equal Protection Clause of the Fourteenth Amendment does not forbid all classifications. Unless a particular classification burdens a fundamental right or draws distinctions based on suspect classifications, the requisite statute will be upheld if found to be rationally related to a legitimate governmental interest. See Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997).

Inmates are not a suspect class, see Nicholas, 114 F.3d at 20, nor is the right to incorporate fundamental. Accordingly, the "civil death" provisions of Section 79-a should be upheld if they are rationally related to a legitimate state interest. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). In applying the above test, the Court cannot conclude that the legislature's decision to prohibit the state's most violent criminals from conducting business activities while incarcerated is irrational. Nothing submitted by plaintiff rebuts this idea or otherwise provides evidence that the law is unreasonable. See Fromer v. Scully, 874 F.2d 69, 74 (2d Cir. 1989). Accordingly, defendants' motion for summary judgment as to this portion of plaintiff's claim is granted.[10]

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[10] Although not asserted by plaintiff, Section 270.2 in Article 7 of the New York State Compilation of Codes, Rules, and Regulations also concerns the contractual rights of inmates. Specifically, Institutional Rule of Conduct #103.20 of Section 270.2 permits inmates to petition the DOCS for permission to enter into specific contractual obligations and to solicit goods from family members. See 7 N.Y.C.R.R. § 270.2, Institutional Rule of Conduct #103.20. Recognizing a court's obligation to construe a pro se plaintiff's complaint liberally, a brief discussion of this possible claim is appropriate.

Whether the application of the above regulation implicates a constitutional right concerns the important proposition that inmates maintain rights that are not inconsistent with their position as prisoners, or with "legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Put another way, plaintiff's rights are not violated by the "civil death" provisions of Institutional Rule of Conduct #103.20 if the regulation is reasonably related to a legitimate penological interest. Id.

The determination of whether a legitimate penological interests exists involves a four factor test promulgated by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987). The factors are: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remains open to prison inmates; (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and the allocation of prison resources generally; and (4) the absence of ready alternatives. Id., 482 U.S. at 89.

In applying the above test, the Court finds it reasonable for the State of New York to promulgate a regulation that prohibits violent criminals from conducting activities involving business or contractual activities. Certainly, this sort of regulation does not appear irrational. See Fromer v. Scully, 874 F.2d 69, 74 (2d Cir. 1989). The DOCS regulation also pasts muster under the Second Turner factor. While inmates are strictly prohibited from engaging in any activity involving the solicitation of goods or services without prior DOCS approval, a limited right to contract is available through petition to the DOCS. Further, inmates are allowed to solicit goods from family members. As to the third Turner factor, the Court finds that the allocation of additional prison resources to facilitate, manage, and police the development and administration of inmate corporations would be extreme. Finally, as to the fourth factor, the existence of alternative means which fully accommodate the right to incorporate at a de minimis cost to otherwise valid penological interests is not readily apparent.

In sum, the Court is simply unable to conclude, based on the above four Turner factors, that a reasonable relationship does not exist between 7 N.Y.C.R.R. § 270.2, Institutional Rule of Conduct #103.20 and any legitimate penological objective. Accordingly, even construing

Plaintiff next contends that if he is deemed "civilly dead" pursuant to Section 79-a, his spouse and children are entitled to federal benefits as if he were dead. While plaintiff does not state what federal benefits he or his family are entitled, any such claim pursuant to Section 79-a is without merit. Quite simply, Section 79-a plays no part in the allocation or limitation of federal benefits programs to incarcerated felons. Rather, the limitation of benefits allocated to inmates is codified at 42 U.S.C. § 402.

42 U.S.C. § 402(x) functions as a limitation on all monthly benefit payments received by inmates.[11] In examining Section 402(x), the Second Circuit, in Zipkin v. Heckler, 790 F.2d 16 (2d Cir. 1986), found that the rationale behind the limitation on prisoner's benefits is clear because "as a group, [prisoners] do not have the need for a continuing source of income that nonprisoners typically may have." Zipkin, 790 F.2d at 18. Indeed, the Second Circuit concluded that Section 402(x) sufficiently passes constitutional muster. Although not specifically faced with the issue of whether the benefits to dependents of an

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plaintiff's complaint to include an allegation under the above regulation, plaintiff's claim is without merit.

[11] Section 402(x) provides in pertinent part:

> (x)(1) Notwithstanding any other provision of this subchapter, no monthly benefits shall be paid under this section or under section 423 of this title to any individual for any month ending with or during or beginning with or during a period of more than 30 days throughout all of which such individual (i) is confined in a jail, prison, or other penal institution or correctional facility pursuant to his conviction of a criminal offense

42 U.S.C. § 402(x)(1)

incarcerated felon may also be terminated, the court stated that "section 402 seems to leave such benefits intact." Zipkin, 790 F.2d at 19.

Here, because plaintiff has neither stated what federal benefits he believes he should receive or what, if any, dependants are available for receipt of said benefits, plaintiff's claims, even liberally construed, are without merit.[12] The Court, nevertheless, deems the Second Circuit's dicta in Zipkin a reasonable reading of Congress' intent in enacting Section 402(x). This issue is moot, however, since no dependants or particular federal benefits have been identified by plaintiff. Defendants' motion for summary judgment as to this portion of plaintiff's claim is granted.

D. Denial of "Good Time Credits" and Earned Eligibility Program

Finally, plaintiff asserts that he has been denied his constitutionally-protected right to equal-protection because as an inmate serving a life sentence, he does not have an opportunity to earn good time credits or to participate in the Earned Eligibility Program pursuant to Section 803 and 805 of the New York Corrections Law. The Court takes each provision independently.

1. Section 803 of the New York Corrections Law - "Good Time Credits"

In relevant part, Section 803 of the New York Corrections Law states

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[12] Defendants submitted the affidavit of Corrections Counselor William Fulton who states that there are no marriage licenses on file for plaintiff. According to DOCS records, plaintiff had two common law wives and that plaintiff has one child who has reached his majority. The affidavit also stated that plaintiff has one grandchild.

> (1)(a) Every person confined in an institution of the department or a facility in the department of mental hygiene serving an indeterminate or determinate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, may receive time allowance against the term or maximum term of his sentence imposed by the court. Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.

N.Y. Correct. L. § 803(l)(a) (McKinney Suppl. 2000). As mentioned above, inmates are not a suspect class for purposes of an Equal Protection inquiry. See Nicholas, 114 F.3d at 20. Further, "even assuming that [Section 803] creates a right to obtain a reduction in one's sentence, this right would not be fundamental". Curtis v. Pataki, No. 96-CV-425, 1997 WL 614285, *6 (N.D.N.Y. Oct. 1, 1997) (Pooler, J). Moreover, the legislature's decision to grant good time credits "is a matter of legislative grace." People ex rel. McNeil v. New York State Bd. of Parole, 394 N.Y.S.2d 230, 232 (2d Dep't 1977). Accordingly, the Court must only determine if Section 803 is rationally related to a legitimate governmental interest. See Nicholas, 114 F.3d at 20.

Magistrate Judge Di Bianco found that Section 803's statutory scheme was rationally related to a legitimate governmental interest for two reasons. First, the statutory

provision serves administrative convenience, as the deduction of good time from a life sentence would be impracticable. Second, Magistrate Judge Di Bianco determined that the New York State Assembly was entitled to assume that judges would give maximum sentences to felons who committed the most serious of crimes and were, therefore, the least deserving of early release based on "good time."

Because the Court agrees with the Magistrate Judge's above determination as to administrative convenience and additionally finds that the denial of good time credits to inmates serving life sentences is rationally related to ensuring that inmates convicted of the most serious crimes are not released early, this portion of defendants' summary judgment motion is granted.

2. Section 805 of the New York Corrections Law

Section 805 of the New York Corrections Law provides that incarcerated individuals serving minimum term of six years or less, who have been issued certificates of earned eligibility, shall be granted parole at the expiration of their minimum terms, unless it is determined prior to release that there is a reasonable probability that the individual will not remain at "liberty without violating the law and that his release is not compatible with the welfare of society." N.Y. CORRECT. LAW § 805. In his objections to the Magistrate Judge's Report-Recommendation, plaintiff asserts that if this Court were to follow Magistrate Judge Di Bianco's recommendations, "equal protection of the law [would not be applicable to] 'lifers' [because] they can be discriminated against to prohibit prospects of ... maintain[ing] an 'expectation of liberty.'"

The Court disagrees and adopts the reasoning of the Magistrate Judge on this issue. Like Section 803 above, the statutory scheme of Section 805 must merely be shown to reasonably relate to legitimate governmental interests in order to withstand an Equal Protection attack. The Court finds it rational for Section 805 to exclude incarcerated felons serving life sentences from a program, that by its very design, promotes early release. Consequently, this portion of defendants' motion for summary judgment is granted.

CONCLUSION

Upon careful review of the entire file, all party submissions, and applicable law, it is

ORDERED that Magistrate Judge Di Bianco's Report-Recommendation dated July 18, 2000, is **ADOPTED IN FULL**; and it is further

ORDERED that defendants' motion for summary judgment is **GRANTED**; and it is further

ORDERED that plaintiff's action is dismissed in its **ENTIRETY**.

IT IS SO ORDERED

Dated: January ____, 2000
Syracuse, New York

/s/

Norman A. Mordue
United States District Judge

42 U.S.C. § 1973

United States Code
Title 42. The Public Health and Welfare
Chapter 20. Elective Franchise
Subchapter I-A. Enforcement of Voting Rights

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub.L. 89-110, Title I, § 2, Aug. 6, 1965, 79 Stat. 437, redesignated Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314, and amended Pub.L. 94- 73, Title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

New York State Election Law § 5-106

Chapter Seventeen Of the Consolidated Laws
Article 5. Registration and Enrollment of Voters
Title I. General Provisions

§ 5-106. Qualifications of voters; reasons for exclusion

1. No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or any other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or for registering or refraining from registering as a voter, or who shall make any promise to influence the giving or withholding of any such vote or registration, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of an election, shall vote at such election.

2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

3. No person who has been convicted in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or

restored to the rights of citizenship by the president of the United States, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

4. No person who has been convicted in another state for a crime or offense which would constitute a felony under the laws of this state shall have the right to register for or vote at any election in this state unless he shall have been pardoned or restored to the rights of citizenship by the governor or other appropriate authority of such other state, or his maximum sentence has expired, or he has been discharged from parole.

5. The provisions of subdivisions two, three and four of this section shall not apply if the person so convicted is not sentenced to either death or imprisonment, or if the execution of a sentence of imprisonment is suspended.

6. No person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.

(L.1976, c. 233, § 1; amended L.1976, c. 234, § 19; L.1978, c. 373, § 39; L.1982, c. 82, § 1.)

United States Constitution

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or

judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Constitution

Amendment XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM,

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel

J. Peter Coll, Jr.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York
10103
(212) 506-5000

Jonathan William Rauchway
Counsel of Record

William A. Bianco
Gale T. Miller
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, Colorado 80202
(303) 892-9400

Counsel for Petitioner

In the Supreme Court of the United States

Jalil Abdul Muntaqim, a/k/a Anthony Bottom,

Petitioner,

v.

Phillip Coombe, Anthony Annucci, Louis F. Mann,

Respondents.

SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

STATEMENT ON SUPPLEMENTAL APPENDIX

At the direction of the Clerk of the Court, two supplemental appendices are included herein: (1) the report and recommendation of the United States Magistrate Judge in this case; and (2) a recent order of the Eleventh Circuit, *Johnson v. Governor of Florida*, No. 02-14469, --- F.3d --- (11th Cir. July 20, 2004), granting rehearing *en banc* and vacating that court's panel opinion. The Eleventh Circuit's panel opinion in *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), is one of the cases cited by Petitioner to demonstrate the division among and between the Circuits on the questions for which he seeks a grant of certiorari. Petitioner was not aware of the Eleventh Circuit's order when he filed his brief in support of this petition.

SUPPLEMENTAL APPENDICES

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JALIL ABDUL MUNTAQIM, a/k/a
ANTHONY BOTTOM,

Plaintiff,

vs. 94-CV-1237
(J. Mordue)

PHILIP COOMBE; ANTHONY
ANNUCCI; LOUIS F. MANN,

Defendants.

APPEARANCES OF COUNSEL

JALIL ABDUL MUNTAQUIM
Plaintiff pro se
77A4283
Auburn Correctional Facility
P.O. Box 618
135 State Street
Auburn, New York 13024

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224

RICHARD J. FRESHOUR
Asst. Attorney General

GUSTAVE J. DI BIANCO, Magistrate Judge

REPORT-RECOMMENDATION

This matter has been referred to the undersigned for Report and Recommendation by the Honorable Norman A. Mordue, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

In the instant civil rights complaint, plaintiff alleges that the New York statutes governing "civil death," the disenfranchisement of felons, and the award of "good time credits" are unconstitutional. Plaintiff seeks declaratory, injunctive, and monetary relief.

Presently before the court is defendants' motion for summary judgment pursuant to FED. R. CIV. P. 56. Plaintiff has responded in opposition to the motion. For the following reasons, the undersigned agrees with defendants and will recommend dismissal of the complaint.

DISCUSSION

1. Summary Judgment

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine issue of material fact. FED. R. CIV. P. 56; *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990) (citations omitted). "Ambiguities or inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion." *Id.* However, when the moving party has met its burden, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). At that point, the nonmoving party must

move forward with specific facts showing that there is a genuine issue for trial. *Id.*

2. Facts

Plaintiff alleges that because he is a "lifer," he has been prevented from voting in state and federal elections pursuant to N.Y. ELECT. LAW § 5-106 which denies the right to vote to those individuals convicted of felonies. Plaintiff claims that section 5-106 violates the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. Plaintiff also alleges that New York State Civil Rights Law § 79(a) which provides that a person sentenced to life imprisonment is considered civilly dead is discriminatory. Plaintiff then states that if he is to be declared "civilly dead" then his family should be entitled to federal benefits as if plaintiff were dead.

Plaintiff also challenges N.Y. CORRECT. LAW §§ 803 and 805. Plaintiff claims that section 803 violates equal protection because it excludes inmates sentenced to life imprisonment from the ability to accumulate good time credits. Plaintiff alleges that section 805 is unconstitutional because it prevents inmates who are serving a minimum sentence of more than six years from participating in the Earned Eligibility Program.

2. Elections Law

The Elections Law in New York State provides that

> 2. No person who has been convicted of a felony pursuant to the laws or this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum

> sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. ELECT. LAW § 5-106(2). The Voting Rights Act of 1965 (VRA) prohibits qualifications or prerequisites to voting that are based upon race or that "result in" a denial or abridgement of the right of any citizen to vote. 42 U.S.C. § 1973(a). Section 1973(b) provides that a violation of the statute is established if, based on the totality of the circumstances, it is shown that the political processes that lead to nomination or election to political office are not equally open to participation by members of the protected class of citizens in subsection (a), in that the members of the protected class have less opportunity that other members of the electorate to participate in the political process and to elect representatives of their choice. *Id.* § 1973(b).

Felon disenfranchisement statutes such as section 5-106 have been the subject of prior litigation. In the Second Circuit, a group of inmates brought a challenge to section 5-106, alleging violations of both the 14th and 15th Amendments and the Voting Rights Act. The district court initially dismissed their action *sua sponte*. *Baker v. Cuomo*, 842 F. Supp. 718 (S.D.N.Y. 1993)(*Baker I*). A panel of the Second Circuit reversed the district court's decision, finding that although plaintiffs had not sufficiently stated claims under the 14th and 15th Amendments, the plaintiffs did state a claim under the VRA. *Baker v. Cuomo*, 58 F.3d 814 (2d Cir.), *cert. denied*, 516 U.S. 980 (1995)(*Baker II*). The panel reaffirmed its decision in a denial of rehearing *Baker v. Cuomo*, 58 F.3d at 824-25 (*Baker III*), and granted rehearing

en banc only with respect to the Voting Rights claim. *Baker v. Cuomo*, 67 F.3d 39 (2d Cir. 1995)(*Baker IV*).

The *en banc* court was evenly divided on whether the inmates stated a claim under the VRA. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996)(*Baker V*). The effect of this was to uphold the decision of the district court which had dismissed plaintiffs' claims, but *Baker V* does not have any precedential value itself. *See Farrakhan v. Locke*, 987 F. Supp. 1304, 1309 n.3 (E.D. Wash. 1997). The Eastern District of Washington has held that inmates may state a claim under the VRA. *Farrakhan v. Locke*, 987 F. Supp. at 1304, 1307-14. The Eastern District of Virginia considered a constitutional challenge to Virginia's disenfranchisement statute and found, without considering the VRA, that plaintiffs did not state a claim under the Equal Protection Clause of the Fourteenth Amendment. *Perry v. Beamer*, 933 F. Supp. 556 (E.D. Va.), *aff'd*, 99 F.3d 1130 (4th Cir. 1996).

This court agrees with the judges in *Baker* who found that the VRA did not apply to the New York felon disenfranchisement statute. In *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974), a pre-VRA case, the Supreme Court held that the disenfranchisement of ex-felons did not violate the Equal Protection Clause of the Fourteenth Amendment. Specifically, the court in *Richardson* cited section 2 of the Fourteenth Amendment as a basis for finding disenfranchisement constitutional. *Id.* at 54. Section 2 of the Fourteenth Amendment provides that if the right to vote is denied to any of the male inhabitants of a state who are over twenty one years of age "***or in any way abridged, except for participation in rebellion, or other crime,***" the basis of representation shall be reduced proportionately. U.S. CONST. amend. XIV, § 2. This section clearly implies that the denial of the right to vote to felons is authorized and anticipated since the denial of this right to felons will not bring about the sanction of reduced representation.

The question then becomes whether the VRA applies to felon disenfranchisement statutes notwithstanding their constitutional validity if the disenfranchisement statute "results" in the denial or abridgement of a citizen's right to vote based upon race. As stated by the five judges of the Second Circuit who voted against the application of the VRA to section 5-106, the "results test" of the VRA was enacted pursuant to its authority under the enforcement provisions of the Fourteenth and Fifteenth Amendments. *Baker*, 85 F.3d at 926. The Fourteenth and Fifteenth Amendments themselves may be violated only by intentional action, but the VRA reaches conduct, not directly violative of the constitution, but which "results in" the denial of the right to vote based upon race. *Id.* at 926-27.

The VRA applies to "tests or devices" that impose restrictions or requirements on the right to vote. *Id.* at 925 n.8 (citing 42 U.S.C. § 1973(4)(c)). The VRA contains a number of provisions, some of which are applicable to only certain jurisdictions that had traditionally employed certain tests or voter qualifications on various enumerated dates. *Id.* at 924-25 (citing 42 U.S.C. § 1973b(b)). The act also contains a number of provisions that apply to all jurisdictions, and as ***originally enacted***, section 1973 barred the imposition of voter qualifications, such as literacy tests, or other procedures, neutral on their faces, that were prerequisites to voting, but denied the right to vote based on race if the motivation for their use was discriminatory. *Id.* at 925 (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980)).

The VRA was amended in 1982 to prohibit any "'voting qualification or prerequisite to voting or standard, practice, or procedure ... which *results* in a denial or abridgement of the right of any citizen ... to vote on account of race or color,'" without the requirement of a discriminatory motive.

Id. at 926 (omissions in original)(citing *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)).

The court in *Baker* cited cases in which sections of the VRA were held to prohibit certain state practices. *Id.* at 927 (citing *inter alia*, *Katzenbach v. Morgan* 384 U.S. 641 (1966)). In *Katzenbach*, the Supreme Court determined that section 1973b(e) was constitutional in its provision that no person who had successfully completed the sixth grade in a school in which the predominant language was something other than English could be denied the right to vote. *Id.* The court stated that although the section of the VRA was phrased in general terms, it was enacted for the purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. *Id.*

The VRA has also been held to prohibit certain state durational residency requirements and other literacy tests. *Baker*, 85 F.3d at 927 (citing *Oregon v. Mitchell*, 400 U.S. 112. (1970)). The five members of the court in *Baker* then found that the proposed application of section 1973 to section 5-106 could not find support in any of the previously cited Supreme Court cases dealing with the VRA. The court stated that although the Supreme Court had upheld nationwide bans on certain state practices, those bans addressed specific disfavored practices that "perpetuated historical discrimination of an unconstitutional kind." 85 F.3d at 928. In a footnote, the Second Circuit noted that it was unclear that "as a general rule" the "'results' methodology" of section 1973 is constitutionally valid because the Supreme Court had never authorized this methodology in furtherance of the enforcement of the Fourteenth and Fifteenth Amendments. *Id.* at 928 n.12.

The court in *Baker* then stated that unlike the practices at which the VRA was aimed, the practice of depriving felons of the right to vote was a widespread historical practice,

existing prior to the passage of the Civil War Amendments. *Id.* at 928. The five judges then reasoned that the

> prevalence of this practice prior to the passage of the Civil War Amendments indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments.

Id. However, the court did note that prior to 1890, no southern state required proof of literacy, understanding of the constitution, or good moral character as prerequisites to voting, but those "tests and devices" were shortly to appear in most of the states with large African American populations. *Id.* at 929. Clearly, the point of this discussion was to show that felon disenfranchisement was in existence before the racial minority was afforded the right to vote and that therefore, the purpose of the statutes was not to disenfranchise African Americans or other minorities. Instead, the judges of the Second Circuit noted that felon disenfranchisement statutes were generally enacted for "compelling, nondiscriminatory reasons," and were not subject to the risk of discriminatory application and the possibility of fraudulent manipulation that characterized the tests mentioned above *Id.* at 929-30.

The five judges then stated that any attempt by Congress to subject the felon disenfranchisement statutes to the "results" methodology of section 1973 would "pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." 85 F.2d at 930. The judges also stated that if through a statute, Congress intends to "alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention to do so

'unmistakably clear in the language of the statute.'" *Id.* at 931 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)). Finding that the application of section 1973 to state felon disenfranchisement statutes would "undermine the constitutional balance between the federal and state governments," the judges reasoned that a clear statement by Congress was necessary. *Id.*

The five judges reasoned that this application would undermine the balance because the states have the primary responsibility for regulating the time, place, and manner of conducting federal elections as well as the more obvious responsibility for regulating state elections. *Id.* (citation omitted). Additionally, although the Civil War Amendments and the VRA significantly intrude upon the states' authority in certain circumstances where discriminatory practices are apparent, these provisions were enacted against a setting in which felon disenfranchisement statutes had a long history and were specifically recognized as valid in the Fourteenth Amendment. *Id.* The judges also stated that insofar as disenfranchisement was a penalty for violating the criminal law, traditionally, the states had the responsibility for fashioning appropriate punishments. *Id.*

The judges stated that an ***explicit*** constitutional balance has been struck by the mandate in the Fourteenth Amendment that the adverse consequences of reduced congressional representation would not result from the enforcement of felon disenfranchisement statutes. *Id.* Thus, if Congress were to upset that balance, a clear statement in the statute would be required. The court in *Farrakhan* disagreed with this interpretation, finding that the enforcement provisions of the Civil War Amendments to the Constitution had already changed the "usual constitutional balance" between the states and the federal government, allowing Congress to police states for violations of the constitutional rights of racial minorities. 987 F. Supp. at

1309. The court reasoned that because the amendments had already altered the federal-state balance as contemplated by the ***original constitution***, the "plain statement" rule was "simply inapplicable" to the VRA. *Id.*

If this interpretation were correct, then the "plain statement" rule would never apply to legislation enacted to enforce the Fourteenth Amendment. However, in *Gregory v. Ashcroft*, 501 U.S. at 470, the Supreme Court held that the "plain statement rule" would apply regardless of whether the legislation was enacted pursuant to the Commerce Clause power or section 5 of the Fourteenth Amendment. The judges of the Second Circuit who supported the application of the VRA to felon disenfranchisement statutes cited *Chisom v. Roemer*, 501 U.S. 380 (1991) for the proposition that the "plain statement" rule does not apply to the VRA. *Baker*, 85 F.3d at 938 (Feinberg, Newman, Meskill, Kearse, and Parker).

Chisom was a case in which the issue was whether the VRA applied by its own terms to judicial elections since section 2(b) referred to violations of the act being shown when protected citizens had less opportunity than other members of the electorate to participate in the political process and to elect ***representatives*** of their choice. 501 U.S. 295-96. The court did not use the term "plain statement," nor did it apply the "plain statement" rule, however, the court reasoned that judicial elections were included in the reach of the VRA prior to the 1982 amendments, and if Congress had intended to so limit the reach of the VRA it would have made it explicit in the statute or would have discussed the issue in the "extensive legislative history" of the 1982 amendment, particularly when the rest of the amendment was enlarging the reach of the VRA. 501 U.S. at 391-396. In view of the factual circumstances in *Chisom*, the fact that the "plain statement" rule was not mentioned or applied does not indicate that the rule would never be applicable to section

1973, given *Gregory's* clear statement that the rule would apply to challenge legislation enacted under the Fourteenth Amendment.

One court has held that the VRA does apply to felon disenfranchisement statutes, but that plaintiffs could not state a claim for a violation of the VRA based upon the factors that the court must consider under the statute. *See Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). *Wesley* has been criticized as a misinterpretation of the VRA, requiring a higher standard of proof from plaintiffs than the standard contemplated by the Act. *See Farrakhan*, 987 F. Supp. at 1312-13. Although the court in *Wesley* considered the possible disproportionate number of non-white felons, the court also found that a factor to consider was the social goal justifying the disenfranchisement of felons and the theory that those individuals who choose to violate society's rules should not be allowed to participate in their promulgation. 791 F.2d at 1261-62. The *Wesley* court cited the Second Circuit's decision in *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) as support for this proposition. *Id.*

In his memorandum of law, plaintiff also states that section 5-106 is inconsistent with the New York State Constitutional section providing for equal protection of the law and inconsistent with the section providing that the vote will not be denied based on race. Section 5-106 does not deny the right to vote based upon race, but upon conviction of a felony, and the New York State Constitution is not inconsistent as argued by plaintiff.

This court need not reach this issue because of its finding that the VRA does not apply to section 5-106. Thus, plaintiff's claim under the VRA must be dismissed.

3. Civil Death Statute

Plaintiff also alleges that section 79-a of the New York Civil Rights Law is unconstitutional because it renders him unable to contract or engage in business transactions. First, as the defendants point out, section 79-a refers only to marriage contracts, and second, this section has already been held unconstitutional by Senior Judge McCurn in *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989). Plaintiff does not allege that he wishes to marry, but he argues that the civil death statute prevents him from forming other contracts and incorporating a business.

It is not section 79-a that prevents inmates in general from conducting a business while incarcerated. The court would point out that it is a disciplinary violation for any inmate to solicit goods or services from any business or person without prior approval. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2, Institutional Rule of Conduct # 103.20. Other than plaintiff's statement that he attempted to "incorporate," and was refused, plaintiff does not mention any other "contracts" that he has not been able to form.

Plaintiff also alleges that given his "civil death" pursuant to section 79-a, his spouse and children should be able to receive federal benefits as if he were dead. Again, section 79-a deals only with marriage contracts, whereas the receipt of federal benefits is governed by 42 U.S.C. §§ 402 and 423. As defendants point out, 42 U.S.C. § 402(x) governs limitations on payments to prisoners. This section provides that benefits shall not be paid to those incarcerated for felonies, however, benefits to which a non-incarcerated individual would be entitled based upon the wages or income of the confined individual would still be payable. *Id.* § 402(x)(2). Thus, if plaintiff's "family" were entitled to some benefits based upon plaintiff's wages or income, they might be entitled to federal benefits.

However, the defendants also correctly point out that federal benefits are governed by federal law, and the civil death statute does not extend past New York law. Plaintiff is not "dead" for purposes of federal law. Additionally, if plaintiff's dependents were entitled to benefits that they were not receiving, they would have to challenge the receipt of the benefits through the administrative process available to them. *See* 42 U.S.C. § 405. Finally, plaintiff does not allege that his dependents would be entitled to federal benefits based upon his "death," nor does he indicate that he has any dependents to whom benefits would be paid.[1] Thus, plaintiff's challenge to section 79-a is first, moot as to marriage, and second has no merit regarding plaintiff's allegation that he cannot form other "contracts" or obtain benefits for his dependents based on his "civil death."

4. Good Time Credits and Earned Eligibility Program

Plaintiff's final claim is that he has been denied equal protection because as a lifer, he has been excluded from the opportunity to earn good time credits and from participation in the Earned Eligibility Program. In *Curtis v. Pataki,* 96-CV-425, 1997 WL 614285 (N.D.N.Y. Oct. 1, 1997), Judge Rosemary S. Pooler affirmed a report-recommendation by the undersigned, deciding the issue of good time credits for inmates with life sentences. Essentially, then-District Judge Pooler[2] held that inmates serving life sentences are not a suspect classification and the legislature's decision to grant certain inmates good time "'is a matter of legislative grace' and does not create a fundamental right." 1997 WL 614285

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[1] Defendants submitted the affidavit of Corrections Counselor William Fulton who states that there are no marriage licenses on file for plaintiff. He has apparently had two common law wives, neither of which have any contact with plaintiff. The records indicate that plaintiff has one child of majority age and apparently one grandchild. (Docket # 36).

[2] Judge Pooler has since been appointed to the Second Circuit Court of Appeals.

at *3 (citing *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *People ex rel. McNeil v. New York State Board of Parole*, 57 A.D. 2d 876, 394 N.Y.S. 2d 230, 232 (2d Dep't 1977)). Based on the above, the decision not to grant good time credits to inmates with life sentences need only be rationally related to a legitimate government interest. *Id.* (citing *Nicholas v. Tucker*, 114 F.3d at 20). The court found that this decision was rationally related to administrative convenience[3] and stated that the legislature was entitled to assume that judges would give maximum sentences to those who committed the most heinous crimes and were the least deserving of early release. *Id.*

The above rationale applies with equal force to plaintiff's claim that he is not entitled to participate in the Earned Eligibility Program in New York State Corrections Law § 805. By its terms section 805 does not apply to inmates serving a minimum sentence of more than six years. Section 805 provides that those individuals with minimum terms of six years or less and have been issued certificates of earned eligibility shall be granted parole at the expiration of their minimum terms, "unless the board of parole determines that there is a reasonable probability that, that if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." N.Y. CORRECT. LAW § 805.

It is rational to exclude those inmates serving life sentences from a program designed for early release. Plaintiff argues that state officials themselves advocate for changes in the law, lending support to his claim that the law is invalid. However, the fact that New York State decides to change a law or not change a law does not bear on its ultimate constitutionality if the law is constitutional in the

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[3] Deducting good time from a life sentence is obviously impracticable.

first instance. If New York chooses to change the good time statute or the Earned Eligibility Program, it is clearly within the State's prerogative to do. The job of the federal court is not to oversee the wisdom of the Department of Corrections or the New York State legislature, but only to protect the constitutional rights of individuals. If the law does not violate any constitutional provisions, this court must refrain from commenting upon its benefit or lack thereof on the prison population.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that the defendants' motion for summary judgment (docket # 34) be **GRANTED,** and the complaint **DISMISSED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

/s/

Dated: July 18, 2000 United States Magistrate Judge

United States Court of Appeals,
Eleventh Circuit.

Thomas JOHNSON, Derrick Andre Thomas, Eric Robinson, Adam Hernandez, Kathryn Williams-Carpenter, Jau'Dohn Hicks, John Hanes, in their own right and as representatives of all ex-felon citizens of Florida, Plaintiffs-Appellants,
Omali Yeshitela, Plaintiff,
v.
GOVERNOR OF THE STATE OF FLORIDA, Jeb Bush, Secretary of the State of Florida, Katherine Harris, Charlie Crist, Robert Milligan, William Nelson, Robert Crawford, Thomas Gallagher, in their roles as members of the Clemency Board of Florida, Beverly Hill, Alachua County Election Supervisor, et al., Defendants-Appellees.

No. 02-14469.

July 20, 2004.

Jessie Allen, Deborah Goldberg, New York City, for Plaintiffs-Appellants.

Charles J. Cooper, David H. Thompson, Hamish Hume, Derek L. Shaffer, Cooper & Kirk, PLLC, Washington, DC, Robert C. Buschel, Buschel, Carter, Schwartzreich & Yates, Michael David Cirullo, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, FL, H. Ray Allen, III, Tampa, FL, for Defendants-Appellees.

James J. Benjamin, Jr., Akin, Gump, Strauss, Hauer & Feld, LLP, New York City, for Amicus Curiae, Alpert.

John Russell-Cotes Cosgrove, Menlo Park, CA, for Amicus Curiae, Center for Children of Incarcerated Parents.

Paul A. Engelmayer, Wilmer, Cutler & Pickering, New York City, for Amicus Curiae, Holder.

Charles S. Treat, San Francisco, CA, for Seven Nonprofit Public Interest Organizations.

Mark L. Gross, Clay G. Guthridge, U.S Dept. of Justice, Washington, DC, Nancy Chung, Akin, Gump, Strauss, Hauer & Feld, LLP, New York City, Stacey Michelle Schwartz, Akin, Gump, Strauss, Hauer & Feld, LLP, Fort Lauderdale, FL, for Amici Curiae, U.S.

Appeal from the United States District Court for the Southern District of Florida (No. 00-03542-CV-JLK); James Lawrence King, Judge.

(Opinion Dec. 19, 2003, 353 F.3d 1287, 11th Cir.2003).

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, WILSON and PRYOR, Circuit Judges.[1]

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[1] Judge Stanley Marcus has recused himself and will not participate. Judge Phyllis A. Kravitch has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

BY THE COURT:

A member of this Court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this Court en banc. The previous panel's opinion is hereby VACATED.

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

No. 04-175

IN THE

Supreme Court of the United States

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, and LOUIS F. MANN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

CAITLIN J. HALLIGAN*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JULIE M. SHERIDAN
Assistant Solicitor General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

Attorney for Respondents

* *Counsel of Record*

190253

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is applicable to New York Election Law § 5-106, which disenfranchises New York residents who were convicted of a felony and are either in prison or on parole.

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STATEMENT OF THE CASE

Petitioner Jalil Abdul Muntaqim is an African-American male in the custody of the New York State Department of Correctional Services. He was convicted of two counts of murder and is currently serving an indeterminate term of imprisonment of twenty-five years to life at a New York State correctional facility.

Petitioner commenced this action pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, that New York Election Law § 5-106, which disenfranchises New York residents incarcerated for a felony,[1] violates the Voting Rights Act ("VRA") because it "results in the denial or abridgement of the right . . . to vote on account of race." 42 U.S.C. § 1973(a). He seeks this Court's review of a decision of the United States Court of Appeals for the Second Circuit, which dismissed his claim on the ground that the VRA does not apply to New York's felon disenfranchisement law.

The Second Circuit held that application of the VRA to New York's felon disenfranchisement law would alter the traditional balance of power between the states and the federal government in the realms of state criminal and election law. Pet. App. 34a-35a. The court highlighted the "longstanding practice in this country of disenfranchising felons as a form of punishment," Pet. App. 36a; *see also* Pet. App. 3a, 37a, evidenced in part by the practice's express exemption from the sanction of reduced representation for abridgement of the right to vote imposed by Section 2 of the Fourteenth Amendment. Pet. App. 35a-36a. Applying the interpretive principle of

1. Consistent with the Second Circuit's decision below, Pet. App. 7a n.7, we use the term "incarcerated felon" to refer to a person convicted of a felony and either in prison or on parole. We use "ex-felon" to refer to a person convicted of a felony who has completed his or her sentence.

Gregory v. Ashcroft, 501 U.S. 452 (1991), the court found no "clear statement in the language of § 1973, or . . . its legislative history" indicating that Congress intended to prohibit a felon disenfranchisement law such as New York's. Pet. App. 22a. In the absence of a sufficiently clear statement of congressional intent, the court read § 1973 not to cover New York's felon disenfranchisement law. Pet. App. 22a, 47a.

Petitioner did not seek rehearing *in banc*. The Second Circuit, however, conducted a poll *sua sponte* as to whether to do so, which failed. *Muntaqim v. Coombe*, No. 01-7260, 2004 U.S. App. LEXIS 20619 (2d Cir. Oct. 1, 2004) (denial of reh'g *in banc*). In concurring and dissenting opinions, a majority of the active judges of the court indicated an interest in rehearing the case *in banc* if review by this Court is denied. *Id.* at *5 (opinion of Straub, Pooler, Sack and Katzmann, Circuit Judges, concurring); *id.* at *6 (opinion of Calabresi, Sotomayor, B.D. Parker, Circuit Judges, dissenting); *see also id.* (opinion of Jacobs, Circuit Judge, dissenting) (noting that "a majority now expresses — or signals — an interest in hearing this appeal *in banc*").

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to resolve a purported conflict between the Second Circuit's decision and decisions of the Eleventh and Ninth Circuits, *see Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), *vacated and reh'g en banc granted*, 377 F.3d 1163 (11th Cir. July 20, 2004); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *petition for cert. filed, Locke v. Farrakhan*, 72 U.S.L.W. 3741 (U.S. May 24, 2004) (No. 03-1597), as well as an "implicit" conflict with decisions of the Fourth and Sixth Circuits, *see Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986),

regarding the applicability of the Voting Rights Act to felon disenfranchisement laws. Pet. at 10-11. Petitioner also asks the Court to grant certiorari to revisit the principles of the plain statement rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452. Pet. at 13-16.

Petitioner's reasons are not compelling. There is no square conflict among the circuits regarding the VRA's applicability to felon disenfranchisement laws. The New York statute reviewed by the Second Circuit disenfranchises only incarcerated felons, while the laws at issue in the other cases relied upon by Petitioner disenfranchise *both* incarcerated *and* ex-felons. As Judge Cabranes, the author of the Second Circuit decision below, pointed out in his concurrence to the denial of rehearing *in banc*, the disenfranchisement of incarcerated felons "presents a significantly narrower legal and policy issue" than that of ex-felons. *Muntaqim*, 2004 U.S. App. LEXIS 20619, *1. The difference is significant because applying the VRA to laws that disenfranchise ex-felons will not alter the federal-state balance of power over criminal matters to the same degree as would its application to laws that disenfranchise incarcerated felons. The state's penological interest in more sweeping disenfranchisement is weaker, and ex felons' voting rights are stronger.

As to the Second Circuit's reliance on the plain statement rule, that doctrine is settled, and its application by the Second Circuit does not warrant review by the Court.

Additionally, this case presents a particularly poor vehicle for certiorari because the Second Circuit has indicated a desire to rehear its decision *in banc* if certiorari fails, *see Muntaqim*, 2004 U.S. App. LEXIS 20619, suggesting that it may well revisit these issues absent any intervention by this Court. The case was correctly decided and certiorari should be denied.

1. There is no split of authority among the circuits warranting review by this Court. As a preliminary matter, the decision of the Eleventh Circuit has been vacated pending *en banc* review by that court, and the decisions of the Sixth Circuit (which is almost twenty years old) and the Fourth Circuit (which is unpublished) did not even consider whether the VRA applies to claims of felon disenfranchisement. That leaves only the decision of the Ninth Circuit. There is no true conflict between that ruling and the Second Circuit's, however, because the New York felon disenfranchisement law differs in relevant respect from its counterpart in Washington, as well as from the laws in Florida (*Johnson*), Tennessee (*Wesley*), and Virginia (*Howard*).

a. In *Johnson v. Governor of Florida*, the Eleventh Circuit held in a footnote that Section 2 of the VRA can be extended to Florida's felon disenfranchisement law. 353 F.3d at 1306-07 n.27. In response to a strongly-worded dissent by Judge Kravitch arguing that application of the VRA to Florida's felon disenfranchisement law would conflict with Section 2 of the Fourteenth Amendment, *id.* at 1314-18, the panel held that Section 2 permits states to disenfranchise convicted felons only in a racially neutral manner, "that is, in a manner that is neither racially motivated nor produces racially disproportionate effects," *id.* at 1306-07 n.27.

Any conflict that might have existed between the Eleventh Circuit's decision in *Johnson* and the Second Circuit's decision below, however, has been eliminated by virtue of a July 20, 2004, order of the Eleventh Circuit granting rehearing *en banc* and vacating the previous panel's opinion. *Johnson*, 377 F.3d 1163.

b. Nor is the Second Circuit's decision inconsistent with the Sixth Circuit's decision in *Wesley*, 791 F.2d 1255, or the Fourth Circuit's decision in *Howard*, 205 F.3d 1333, as neither the Sixth nor the Fourth Circuit actually addressed whether the VRA applied to the felon disenfranchisement laws at issue. Moreover, both of these courts reached the same result as the Second Circuit: dismissal of the plaintiffs' VRA challenges to state felon disenfranchisement laws for failure to state a claim upon which relief can be granted.

In *Wesley*, the Sixth Circuit dismissed the plaintiffs' challenge to Tennessee's felon disenfranchisement law after concluding that plaintiffs had not stated a claim for a violation of Section 2 of the VRA. *Wesley*, 791 F.2d at 1261. *Wesley* did not expressly consider whether the VRA applied to the challenged law. Instead, the court reviewed the "totality of the circumstances," the standard for assessing a Section 2 violation, and concluded that dismissal was appropriate based principally on "the state's legitimate and compelling rationale for enacting the statute." *Id.* at 1260-61.[2] *Wesley* also observed that the voting bar "does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and elect candidates of their choice. Rather, only the commission of a preascertained, proscribed act warrants the state . . . to foreclose a certain individual from the voting process." *Id.* at 1262. Because the court dismissed the claim as a matter of law, it did not need to address the constitutional issues raised in this case. Nor would it have, since *Wesley* was

2. The Sixth Circuit cited Section 2 of the Fourteenth Amendment; this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974); and a rationale for felon disenfranchisement based on Locke's social contract theory set forth in *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). *Wesley*, 791 F.2d at 1261.

decided almost 20 years ago, before relevant developments in this Court's constitutional jurisprudence, including its decision in *Gregory v. Ashcroft*.

The Fourth Circuit's analysis of Virginia's felon disenfranchisement law in *Howard*, 205 F.3d 1333, an unpublished opinion, is scant. Relying on the Sixth Circuit's decision in *Wesley*, the court simply held that the plaintiff in that case "failed to plead any nexus between the disenfranchisement of felons and race." *Id.* As in *Wesley*, there was no need for the court to address the issue of the applicability of the VRA to the felon disenfranchisement law because the plaintiff's claim fell on other grounds. In any event, the decision is unpublished and therefore has limited precedential value. *See* Rule 36(c) of the Local Rules of the Fourth Circuit.

c. The only federal appellate decision expressly holding that the VRA provides a basis to challenge a felon disenfranchisement law is the Ninth Circuit's decision in *Farrakhan*, 338 F.3d 1009. Even if the Second Circuit had not indicated its willingness to consider further review of the decision below, any split would be extremely shallow, and intervention by this Court thus unwarranted. More importantly, as examination of the state law at issue in each case demonstrates, even that conflict is not a genuine one.

In *Farrakhan*, the court began its analysis of whether the VRA applies to Washington's felon disenfranchisement law by holding, in perfunctory fashion, that plaintiff's claim of vote denial was "cognizable" under the VRA, stating that "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates

the VRA." *Id.* at 1016. It attempted to accommodate this Court's holding in *Richardson v. Ramirez* by explaining that "[a]lthough states may deprive felons of the right to vote without violating the Fourteenth Amendment, . . . when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress." *Id.*

The state felon disenfranchisement law at issue in *Farrakhan* — like the state laws considered by the Fourth, Sixth and Eleventh Circuits — deprives both incarcerated and ex-felons of the right to vote.[3] New York's felon disenfranchisement statute, in contrast, is significantly less restrictive in that it disenfranchises only incarcerated felons, that is, felons in the custody and control of the state penal system. Pet. App. 2a; *see Jones v. Cunningham*, 371 U.S. 236 (1963) (parolees, like prisoners, are under state custody); N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.1(a) (2004) (same); *id.* § 8003.2 (listing conditions of parole release);

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3. The Florida law (*Johnson*), like the laws in six other states including Virginia (*Howard*), permanently disenfranchises ex-felons. Fla. Const. art. VI, § 4 (1968); *see* The Sentencing Project, *Felony Disenfranchisement Laws in the United States* at 3 (September 2004), at http://www. sentencingproject.org/pdfs/1046.pdf. In these states, ex-felons must obtain a pardon or other type of restoration of civil rights from the state's governor or from the state's parole or pardons board in order to vote. *See, e.g.*, Fla. Stat. ch. 940 (2004). In seven other states, including Washington (*Farrakhan*) and Tennessee (*Wesley*), only certain categories of ex-felons are permanently disenfranchised. *See Felony Disenfranchisement Laws in the United States* at 3. By one estimate, Washington's law denies the franchise to almost 33,000 ex-felons. *Developments in the Law: The Law of Prisons: VI. One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1949 (2002).

id. § 8003.3 (authorizing the imposition of special conditions of release upon parolees).

This distinction matters for purposes of determining whether the VRA applies to such laws, as the Second Circuit's ruling suggests. Its analysis of New York law is based, in large part, on the use of felon disenfranchisement as a penological tool, rather than a pure regulation of voting. The Second Circuit began by recognizing that states "possess primary authority for defining and enforcing the criminal law," explaining that "[i]f New York State uses disenfranchisement merely as a tool to punish people who violate its laws, the application of § 1973 to § 5-106 would upset 'the sensitive relation between federal and state criminal jurisdiction.'" Pet. App. 34a-35a (internal citation omitted); *see also id.* at 3a, 36a, 37a. For this reason, the court held, New York's felon disenfranchisement law cannot be conflated with other facially neutral voting rules. Pet. App. 34a.

While the New York statute undeniably dictates who can vote, its role as a punitive device, particularly when viewed in light of the states' constitutionally recognized "discretion to deny the vote to convicted felons," Pet. App. 35a (citing Section 2 of the Fourteenth Amendment), led the court to apply a plain statement analysis to determine whether the statute is clearly a "voting qualification . . . standard, practice, or procedure" that can deny or abridge a prisoner's "right . . . to vote" within the meaning of § 1973. 42 U.S.C. § 1973(a).[4] There are two uncertainties that could trigger the

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4. Section 1973(a) states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

plain statement rule here: Whether a tool such as disenfranchisement used to punish serious law violators held in state custody can be considered primarily a "voting qualification" within the meaning of the VRA; and to what extent incarcerated felons retain a "right to vote" recognized under the VRA.[5] The court sought an unmistakably clear statement from Congress that it intended the VRA to protect the voting rights of incarcerated felons, but found none. Pet. App. 44a-47a.

To hold that the denial of voting rights to incarcerated felons is not a practice covered by the VRA, however, says little about whether voting by ex-felons is so covered. For example, in reviewing an earlier version of New York's felon disenfranchisement law that, like the law at issue in *Farrakhan*, disenfranchised ex-felons as well as incarcerated felons, the Second Circuit held that the provision was regulatory, rather then penological. *Green*, 380 F.2d at 450 ("depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise'") (internal citation omitted). This difference raises the question of whether such a law would more likely be considered a "voting qualification" covered by the VRA than would New York's current law.

The in-custody distinction is also significant because the VRA was enacted to enforce the Reconstruction

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5. The Second Circuit's holding was phrased more generally, presumably because it had no reason to explore the difference between incarcerated and ex-felon disenfranchisement. Judge Cabranes' concurrence from the denial of rehearing *in banc* does note the significance of this distinction, though. *Muntaqim*, 2004 U.S. App. Lexis 20619, *1.

Amendments, and this Court has long held that impingement of the constitutional rights of incarcerated persons is subject to a lower standard of review than the rights of others. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("[I]ncarceration brings about the necessary withdrawal or limitation of many privileges and rights, . . . justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise . . . from the fact of incarceration and from valid penological objectives — including deterrence of crime, rehabilitation of prisoners, and institutional security.") (internal citations omitted); *Turner v. Safely*, 482 U.S. 78, 89 (1987); *see also Griffin v. Wisc.*, 483 U.S. 868, 874 (1987) ("[I]t is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty."). It is therefore questionable whether incarcerated felons in fact maintain the same constitutional voting rights as ex-felons, and thus whether the VRA would apply equally to both.

In sum, because the Washington law covers ex-felons and New York's does not, the Second Circuit's analysis — tethered as it is to the penological function of disenfranchising incarcerated felons — does not implicate the same concerns at issue in the Ninth Circuit's decision. And for the same reason, it is not at all evident that the Second Circuit, were it to consider a law disenfranchising ex-felons, would reach a result different than the Ninth Circuit. The circuit split identified by Petitioner is thus reconcilable, and not worthy of this Court's review.

2. Petitioner argues that certiorari should be granted because the Second Circuit has failed to properly apply the plain statement rule of *Gregory v. Ashcroft*. Even if his critique of the Second Circuit's decision were correct, which it is not, Petitioner would have established at most that the court misapplied a well-settled rule of law. This point does not warrant intervention by the Court. *See* Rule 10, Rules of the Supreme Court of the United States.

3. As already discussed, given that a majority of the active judges of the Second Circuit have indicated an interest in rehearing this case *in banc*, this Court should deny certiorari. In addition, in light of other ongoing judicial and legislative activity in this area, Supreme Court review of whether the VRA applies to felon disenfranchisement laws would be premature at this point. But should the Court nonetheless decide to address this issue, it would be better served by first considering broader disenfranchisement laws that cover ex-felons.

a. The lower courts are increasingly addressing the question of whether the VRA applies to felon disenfranchisement, which involves a complex intersection of voting rights, crime and punishment, state sovereignty, constitutional law, and political theory that would clearly benefit from further percolation. Such input is forthcoming, as the Eleventh Circuit sitting *en banc* is about to review whether felon disenfranchisement is covered by the VRA, and a majority of the active judges of the Second Circuit have indicated an interest in rehearing this case *in banc* if certiorari is denied. Regardless of outcome, this Court can only benefit from further consideration among the lower courts, especially since the panel opinions in the Ninth and Eleventh Circuits have given the question only cursory treatment

(a footnote in *Johnson*, 353 F.3d at 1306 n.27, and two paragraphs in *Farrakhan*, 338 F.3d at 1016).

b. Supreme Court review at this juncture also risks inhibiting further political developments at a time when states are migrating toward a moderate, consensus view to allow ex-felon voting, consistent with the recommendations of the National Commission on Federal Election Reform and the American Bar Association. *See* National Commission on Federal Election Reform, *Final Report of the Commission*, Ch. IV, at 45 (July 31, 2001); American Bar Association, *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, Standard 19-2.6(a) and Report at R-12 (3d ed. August 2003).[6] In keeping with this trend, over the past several years a number of bills have been introduced in Congress to allow ex-felon voting.[7] These bills, together with the impending expiration of provisions of the VRA, *see* 42 U.S.C. § 1973b(a)(8), will provide an opportunity for national hearings and debate on the topic. Given the pace and consistent direction of recent political developments, it would be highly advantageous to give the states and Congress more time to develop a political, rather than judicial, solution that will serve the states' penological goals while protecting their citizens' interests in electoral participation.

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6. Between 1996 and 2003, eleven states amended their felon disenfranchisement laws. Eight adopted less restrictive laws, two added restrictions on prisoner voting, and one added a restriction on probationer voting. *See* The Sentencing Project, *Legislative Changes on Felony Disenfranchisement, 1996-2003*, at 1 (Sept. 2003), at http://www.sentencingproject.org/pdfs/legchanges-report.pdf.

7. *See, e.g.*, Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. (2003); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. (2003); Constitutional Protection of the Right to Vote Act, H.R. 2935, 108th Cong. (2003).

c. Should the Court nonetheless decide immediate judicial intervention is warranted, the orderly development of the law would be better served were this Court to first address the more extreme position on felon disenfranchisement taken by Washington, Florida, and other states. One such opportunity is currently before the Court. *See Locke v. Farrakhan*, No. 03-1597 (*petition for cert. filed* May 24, 2004). The Eleventh Circuit's *en banc* consideration of Florida's felon disenfranchisement law may present another vehicle. *See Johnson*, 377 F.3d 1163.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016
Attorney for Respondents

CAITLIN J. HALLIGAN*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

JULIE M. SHERIDAN
Assistant Solicitor General

* *Counsel of Record*

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No. 04-175

IN THE
Supreme Court of the United States

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

Of Counsel

J. Peter Coll, Jr.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York
10103
(212) 506-5000

Jonathan William Rauchway
Counsel of Record

William A. Bianco
Gale T. Miller
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, Colorado 80202
(303) 892-9400

Counsel for Petitioner

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In the Supreme Court of the United States

Jalil Abdul Muntaqim, a/k/a Anthony Bottom

Petitioner,

v.

Phillip Coombe, Anthony Annucci, Louis F. Mann,

Respondents.

PETITIONER'S REPLY MEMORANDUM

In opposing the Petition, Respondents ("the State") ignore the repeated pronouncements of the court below that the conflict between the circuits on the application of Section 2 of the Voting Rights Act ("VRA") to a state felon-disenfranchisement law "is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court." Pet. App. 1a-2a; *see also id.* at 49a ("[A]ll three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court."); App., *infra*, 3a, 4a (Cabranes, J., concurring from denial of rehearing *in banc*). The unanimous recommendation of the court of appeals should not be so lightly disregarded.

The conflict between the Second Circuit and the other circuits derives in part from the apparent belief of the court below that the "plain statement" or "clear statement" rule trumped the unambiguous text of Section 2 of the VRA. Only by resorting to the plain statement rule was the court able to arrive at its conclusion that the VRA "does not apply" to New York's felon-disenfranchisement statute. Pet. App.

22a; *see also id.* at 48a. As it did below, the State declines to engage Petitioner's argument that this misconception of the plain statement rule directly conflicts with this Court's precedents. Instead, the State tries to minimize this conflict as a mere "misappl[ication] of a well-settled rule of law." Brief in Opp. at 11. In reality, the scope of the plain statement rule in the area of voting rights is anything but "well-settled," and the Second Circuit's misguided application of this rule to an admittedly unambiguous statute is irreconcilable with this Court's recent decisions.

With regard to the ultimate issue in this Petition – whether a state's felon-disenfranchisement law can be challenged under Section 2 of the VRA – the State's reasons for denying review are likewise unpersuasive. The State argues that because New York's law only disenfranchises felons currently in prison or on parole, this case is distinguishable from the parallel cases challenging state felon-disenfranchisement laws under the VRA pending in other courts of appeals. However debatable from a social or legal policy standpoint, the difference between state laws that disenfranchise felons permanently (and in the case of life sentences, all such laws disenfranchise permanently) and those that do not always do so is irrelevant for the purposes of determining the application of the VRA. The distinction the State urges was not recognized by the court below, nor has any court addressing this issue distinguished between incarcerated and non-incarcerated felons in determining the applicability of the VRA to felon-disenfranchisement laws. *See Johnson v. Governor of Fla.*, 353 F.3d 1287, 1318 (11th Cir. 2003), *reh'g en banc granted, opinion vacated*, 377 F.3d 1163 (2004); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *reh'g and reh'g en banc denied*, 359 F.3d 1116 (2004) (Kozinski, J., dissenting, joined by O'Scannlain, Kleinfeld, Tallman, Bybee, Callahan, and Bea, JJ.), *petition for cert. filed*, -- U.S. -- (May 24, 2004); *Baker v. Pataki*, 85

F.3d 919 (2d Cir. 1996) (*in banc*); *see also Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

ARGUMENT

I. The Court Of Appeals' Interpretation Of The Plain Statement Rule Cannot Be Reconciled With This Court's Precedents.

The State mischaracterizes Petitioner's argument as a request "to revisit the principles of the plain statement rule set forth in *Gregory v. Ashcroft*," Brief in Opp. at 3, and attempts to deflect Petitioner's arguments by asserting that "at most . . . the court misapplied a well-settled rule of law." *Id.* at 11.

First, Petitioner does not ask this Court to revisit the plain statement rule; rather, he asks the Court to reverse the holding of the court of appeals because it directly conflicts with relevant decisions of this Court. *Compare* decision below, Pet. App. 45a-46a n.22, 47a (acknowledging that Section 2 of the VRA is unambiguous and that "on its face" it covers felon-disenfranchisement laws, but applying plain statement rule to avoid this result), *with Penn. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 208-11 (1998); *Salinas v. United States*, 522 U.S. 52, 60 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 57 n.9 (1996); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (all instructing that the plain statement rule cannot be applied to unambiguous statutes to depart from such statutes' terms).

Second, to demonstrate that the scope and application of the plain statement rule is not "well-settled," one need look no further than the fractured decisions of the courts of appeals struggling with the same question presented here.

See Johnson, 353 F.3d at 1318 (Kravitch, J., dissenting) (arguing that felon-disenfranchisement laws should not be subject to the VRA absent a "clear statement" from Congress); *Baker*, 85 F.3d 919 (ten judges sitting *in banc* split 5-5 on whether the plain statement rule can be employed to exempt felon-disenfranchisement laws from review under Section 2 of the VRA); *see also Farrakhan*, 359 F.3d at 1117-27 (Kozinski, J., dissenting from rehearing *en banc*, arguing that "the VRA was never intended to reach felon disenfranchisement laws").

The Second Circuit's misinterpretation and misapplication of the plain statement rule not only was dispositive to deciding the ultimate question presented in this case, it has independent and potentially far-reaching significance to the power of judges to unilaterally disregard the unambiguous meaning of a federal statute if the meaning offends their individual notions of what the federal-state balance of power ought to be. The conflict between the Second Circuit's articulation of the plain statement rule and the decisions of this Court is a compelling reason to grant this Petition. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents"); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted "[b]ecause this ruling appeared to be in conflict with our precedents"); *see also Elder v. Holloway*, 510 U.S. 510, 515 (1994). *See generally* Sup. Ct. R. 10(c).

II. Whether A Racially Discriminatory Felon-Disenfranchisement Statute Can Be Challenged Under The Voting Rights Act Presents A Conflict Among And Within The Circuits That Is Ripe For This Court's Consideration.

The State seizes upon a single sentence in the opinion of one of the judges of the Second Circuit (concurring in denial of rehearing *in banc*) to argue that there is no conflict between the holding of the court below and other circuits because New York's felon-disenfranchisement law affects only incarcerated felons. *See* Brief in Opp. at 3, 8-10. In doing so, the State ignores the same judge's statement – in the same opinion – that "[t]his case presents major questions of constitutional law and statutory interpretation which are now the subject of different holdings in several circuits." App., *infra*, 3a.

For the purposes of applying Section 2 of the VRA, no significant distinction can be based upon whether a state's felon-disenfranchisement law applies only to felons who are incarcerated and, as the State admits, the court of appeals drew no such distinction in its opinion. *See* Brief in Opp. at 9 n.5. Nevertheless, the State rests its argument against a grant of certiorari on the premise that because New York's law applies only to incarcerated felons, it is primarily "a penological tool rather than a pure regulation of voting," *id.* at 8, and therefore should be given greater deference than laws that disenfranchise "ex-felons" as well.[1]

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[1] To the extent the State also relies on Section 2 of the Fourteenth Amendment to defend the court of appeals' decision, *see* Brief in Opp. at 8, the State has not responded to Petitioner's argument that Section 2 of that amendment should not affect Congress's power to enact the VRA, which was primarily designed to enforce the Fifteenth Amendment. *See, e.g.*, Gabriel L. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 Geo. L.J. 259 (2004).

This argument fails for the simple reason that, as the Second Circuit has already held, New York's felon-disenfranchisement law is not a punitive measure, but instead is a "'nonpenal exercise of the power to regulate the franchise.'" *Green v. Bd. of Elections*, 380 F.2d 445, 449 (2d Cir. 1967) (quoting *Trop v. Dulles*, 356 U.S. 86, 97 (1958)). The State strains mightily to distinguish *Green*, which dealt with an earlier version of New York's Election Law that disenfranchised felons while incarcerated and after their sentences had been served. *See* Brief in Opp. at 9. It is difficult to understand, however, how amending New York's felon-disenfranchisement law to apply less harshly transforms a "nonpenal" statute into a "punitive device." *Id.* at 8. In *Trop*, this Court also recognized that felon-disenfranchisement laws are not punitive but rather are "to designate a reasonable ground of eligibility for voting." 356 U.S. at 96-97; *see also Green*, 380 F.2d at 449 (In *Trop*, "the Chief Justice used statutes depriving felons of voting rights to illustrate what is not a penal law."); *Hayes v. Williams*, 341 F. Supp. 182, 189 (S.D. Tex. 1972) (holding that Texas's felon-disenfranchisement law is not punitive, citing *Trop* and *Green*); *Kronlund v. Honstein*, 327 F. Supp. 71, 74 (N.D. Ga. 1971) (same with respect to Georgia's felon-disenfranchisement law). To the extent the court below relied upon the punitive nature of New York's felon-disenfranchisement law at all, such reliance was misplaced, and provides no meaningful distinction from the decisions of other circuits on the applicability of the VRA to such laws.[2]

Finally, although the State does not dispute that the question presented in this case is cert-worthy, it argues that because the Eleventh Circuit has granted *en banc* review in *Johnson* and because the Second Circuit might review this

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[2] The court of appeals' opinion makes only casual reference to possible punitive or penological justifications for New York's felon-disenfranchisement law. *See* Pet. App. 3a, 34a, 36a.

case *en banc* if this Petition is denied, the questions presented are not ripe for this Court's review. *See, e.g.*, Brief in Opp. at 3, 11. Although such an argument against granting certiorari can always be made – at least until every circuit has reviewed the issue and *en banc* proceedings are complete – there is little to be gained from further lower court consideration here. This is a pure issue of law that neither requires nor benefits from a factual record. The issue was the subject of a lengthy opinion in the court below, three thorough opinions in *Baker*, and substantial dissents in both *Johnson* and *Farrakhan*. The *en banc* proceedings in the Second Circuit, the Ninth Circuit, and the Eleventh Circuit are better evidence of lower courts' continuing division on this important issue, rather than evidence that this issue would benefit from further percolation. As the court below repeatedly recognized, this issue will not be resolved in the Second Circuit or in the Eleventh Circuit; definitive guidance from this Court is required. App., *infra*, 4a (Cabranes, J., concurring from denial of rehearing *in banc*) ("[I]t seems clear that the Supreme Court's definitive, nationwide resolution of the questions presented by these cases is appropriate."); *see also* Pet. App. 1a-2a, 49a.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the principal brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan William Rauchway
Counsel of Record

William A. Bianco
Gale T. Miller
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, Colorado 80202
(303) 892-9400

Of Counsel

J. Peter Coll, Jr.
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York
10103
(212) 506-5000

October 21, 2004.

APPENDIX

SECOND SUPPLEMENTAL APPENDIX

Page

Order of the United States Court of Appeals
for the Second Circuit *sua sponte* denying rehearing
in banc, with concurring and dissenting opinions
(October 1, 2004) 1a

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of October two thousand and four,

JALIL ABDUL MUNTAQIM,
a/k/a Anthony Bottom,

Plaintiff-Appellant,

v.

PHILLIP COOMBE; ANTHONY ANNUCCI; LOUIS F. MANN,

Defendant-Appellee.

At the request of a judge, the court *sua sponte* conducted a poll as to whether to rehear this case *in banc*. The suggestion did not garner support from a majority of the active judges on the court, and has therefore failed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/
Richard Alcantara, Deputy Clerk

José A. Cabranes, *Circuit Judge*, concurring:

The question presented in this case should not be confused with the more frequently debated question whether *former* felons should lose their right to vote for a time or even permanently. The issue presented here is whether New York Election Law § 5-106– which disenfranchises persons *currently in prison or on parole*–can be challenged under the Voting Rights Act. This presents a significantly narrower legal and policy issue. *See Developments in the Law: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942-43 (2002) (noting that two states grant prisoners the franchise; sixteen states disenfranchise felons during the incarceration period only; four states, including New York and Connecticut, disenfranchise those incarcerated or on parole, but not those on probation; and twenty-eight states disenfranchise those incarcerated, on parole, or on probation, of which eight permanently disenfranchise those convicted of felonies).

I note also that the New York law here in question dates to 1829 in its original form, more than thirty years before the Civil War. *See* 1 N.Y. Rev. Stat. ch. 6, tit. 1, § 3 (1829) ("No person who shall have been convicted within this state, of an infamous crime, at any time previous to an election, shall be permitted to vote thereat; unless he shall have been pardoned by the executive, and by the terms of such pardon restored to all the rights of a citizen."); *see also* N.Y. Const. Art. 2, § 2 (1829) ("Laws may be passed, excluding from the right of suffrage, persons who have been, or may be, convicted of infamous crimes."). There is no claim in this action that the statute was enacted with any racially discriminatory intent, but rather that the statute "violates the Voting Rights Act because it has 'resulted in the unlawful dilution of voting rolls in the African-American and Hispanic communities of New York City' and because the racial disparity in New York's prison population is caused, at

least in part, by racial discrimination in sentencing." *Muntaqim v. Coombe*, 366 F.3d 102, 105 (2d Cir. 2004) (quoting Compl. ¶ 18).

As the author of the panel opinion which has been the subject of the *en banc* poll, I offer a bit of history. No party has sought *en banc* review in this case; rather, the litigants chose to petition directly for a writ of certiorari in the Supreme Court. They do so with good reason. This case presents major questions of constitutional law and statutory interpretation which are now the subject of different holdings in several circuits. The panel opinion specifically stated that "all three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court." *Id.* at 130. No judge of this Circuit has expressed any view suggesting otherwise.

As noted in our panel opinion, a panel of the Ninth Circuit has held that a claim of vote denial under Washington State's felon disenfranchisement scheme can state a claim under § 1973.[1] *Farrakhan v. Washington*, 338 F.3d 1009, 1012 (9th Cir. 2003) (involving disenfranchisement scheme whereby "disenfranchised felons in Washington remain ineligible to vote until they have completed all the requirements of their sentences and have obtained certificates of discharge" from the sentencing court).[2] In *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), a panel of the Eleventh Circuit, over a

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[1] Judge Richard A. Paez's opinion was joined by U.S. Circuit Judge Dorothy W. Nelson, and U.S. Circuit Judge Harlington Wood, Jr., of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[2] The Ninth Circuit denied a petition for rehearing *in banc* over the dissent of seven judges. *See Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004).

dissent by Judge Phyllis A. Kravitch, assumed, though it did not expressly hold, that § 1973 applies to felon disenfranchisement schemes.[3] *Id.* at 1292-93, 1306 (involving disenfranchisement scheme whereby first-time convicted felons are permanently disenfranchised unless they receive clemency). This judgment was recently vacated when the Eleventh Circuit decided to rehear the case *en banc*. *Johnson v. Governor of Florida*, 377 F.3d 1163 (11th Cir. July 20, 2004).

Petitions for certiorari are currently pending before the Supreme Court in this case as well as in *Farrakhan*. *See Muntaqim v. Coombe*, petition for cert. filed, 2004 WL 1752185, (U.S. July 21, 2004) (No. 04-175); *Locke v. Farrakhan*, petition for cert. filed, 2004 WL 1203077, (U.S. May 24, 2004) (No. 03-1957).

In these circumstances, it seems clear that the Supreme Court's definitive, nationwide resolution of the questions presented by these cases is appropriate.

Straub, Pooler, Sack and Katzmann, *Circuit Judges*, concurring:

While we recognize that the suggestion to rehear this case *in banc* has failed, our concurrence is specifically without prejudice to renewal by a judge or party after the Supreme Court acts on the *certiorari* petitions now pending.

Dennis Jacobs, *Circuit Judge*, dissenting:

I have no qualm about the panel's scholarly opinion; but I vote in favor of the poll nevertheless, because a majority now expresses– or signals– an interest in hearing this appeal

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[3] Judge Rosemary Barkett's majority opinion was joined by U.S. District Judge John P. Fullam, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

in banc. Unless our *in banc* practice is to become a dead letter altogether, this is a circumstance in which our full Court should convene. It is no proper solution for us to forgo *in banc* review "without prejudice," and thus expressly reserve an opportunity to hear the case as a full court if the Supreme Court does not: the Court of last resort is on First Street, not on Foley Square.

Calabresi, Sotomayor, and B.D. Parker, *Circuit Judges*, dissenting:

We respectfully dissent from the court's denial to rehear this appeal *in banc*.